

**PUBLIC VERSION**

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VERIGY US, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

VERIGY US, INC, a Delaware Corporation

Plaintiff,

vs.

ROMI OMAR MAYDER, an individual;  
WESLEY MAYDER, an individual; SILICON  
TEST SYSTEMS, INC., a California Corporation;  
and SILICON TEST SOLUTIONS, LLC, a  
California Limited Liability Corporation,  
inclusive,

Defendants.

Case No. C07 04330 RMW (HRL)

**VERIGY'S RESPONSES TO WES  
MAYDER'S OBJECTIONS TO EVIDENCE  
IN SUPPORT OF MOTIONS FOR  
SUMMARY JUDGMENT & RULE 11  
SANCTIONS**

Date: September 5, 2008  
Time: 9:00 am  
Ctrm.: 6  
Judge: Hon. Ronald M. Whyte

Complaint Filed: August 22, 2007  
Trial Date: None Set

AND RELATED CROSS ACTIONS

**HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY**

**DOCUMENT SUBMITTED UNDER SEAL**

1 Plaintiff Verigy US, Inc. ("Verigy") hereby responds to defendant Wesley Mayder's  
 2 ("W.Mayder") Evidentiary Objections to Portions of Papers Filed by Plaintiff in Opposition to  
 3 Wesley Mayder's Motion for Summary Judgment and For Rule 11 Sanctions set for hearing on  
 4 September 5, 2008 before this Court.

5 **A. DECLARATION OF JOHN W. FOWLER IN OPPOSITION TO**  
 6 **W.MAYDER'S MOTION FOR RULE 11 SANCTIONS**

7 **W.MAYDER'S OBJECTION NO. 1:**

8 Declaration of John Fowler ("Fowler Decl."), at paragraph 2, re statements made on  
 9 information and belief.

10 2. *"I signed the Complaint (Docket No. 1) in the above-captioned action. To the best*  
 11 *of my knowledge, information and belief, formed after an inquiry reasonable under the*  
 12 *circumstances, (a) the Complaint against Wesley Mayder was not presented for any improper*  
 13 *purpose, (b) the claims and legal contentions of the Complaint against him were warranted in my*  
*mind by existing law and I believed that the factual contentions had evidentiary support or were*  
*likely to have evidentiary support after a reasonable opportunity for further investigation or*  
*discovery."*

14 **Grounds for Objection:**

15 Violative of Local Rule 7-5(b), which provides that any affidavit or declaration which  
 16 includes statement made on information and belief must provide the basis for such information  
 17 and belief statement. Mr. Fowler simply offers a conclusory statement in that regard.

18 **VERIGY'S RESPONSE TO THE OBJECTION:**

19 The objection should be overruled. Insofar as Mr. Fowler declares as to his own personal  
 20 mental state concerning what he believed was "warranted in my mind" and what he "believed"  
 21 and as such whether he had an "improper purpose" in signing and filing the action against Wes  
 22 Mayder, the basis is self-evidently Mr. Fowler's own understanding of his own mindset. Insofar  
 23 as Mr. Fowler declares that the claims and legal contentions had evidentiary support or were likely  
 24 to, the foundation for this was the "inquiry reasonable under the circumstances" which he attests  
 25 he performed. The reasonableness of the inquiry is elaborated upon in paragraphs 3-5 of Mr.  
 26 Fowler's declaration. Thus, there is a basis for Mr. Fowler's statement made on information and  
 27 belief.

28 //

**W. MAYDER'S OBJECTION NO. 2:**

Fowler Decl. at paragraph 3 re statement about the Mayder brothers going into business together.

3. *"My investigation into whether Wesley Mayder was liable for the acts alleged in the complaint included the following:*

a. *My interviews of Romi Mayder's supervisors at Verigy regarding Romi's statements to them regarding his plan to go into a real estate business with his older brother, Wesley.*

b. *My review of documents obtained from the California Secretary of State and the Internet regarding the two STS businesses as well as Wesley Mayder's businesses, which show the same street address for STS, Inc. and Wesley Mayder's businesses.*

c. *Interview of Robert Pochowski and review of documents produced by him indicating Wesley Mayder's active participation in STS, LLC."*

**Grounds for Objection:**

Irrelevant and immaterial; no showing that anything about them going into a real estate business together has anything to do with the issues in dispute in this case, and certainly does not support any claim of wrongdoing by Wes Mayder; lack of foundation.

**VERIGY'S RESPONSE TO THE OBJECTION:**

The objection should be overruled. The objection is an argument regarding the weight of the information, not its admissibility. The fact that Romi Mayder told his supervisors he was intending to go into business with his brother Wes Mayder is certainly relevant and material, regardless of the nature of the business he described. Also, the fact that official and online documentation showed that the STS Entities were at the same address as Wes Mayder's business is also relevant and material, especially in combination with the information that the two brothers were intending to go into business together. Finally, the interview with Mr. Pochowski is highly relevant and material since he was privy to the discussions surrounding the formation of STS, LLC and was aware of Wes Mayder's participation in that entity, as stated by Mr. Fowler.

**W.MAYDER'S OBJECTION NO. 3:**

Fowler Decl. at paragraph 3 re statement about Wesley Mayder's business having same street address as STS.

3. *"My investigation into whether Wesley Mayder was liable for the acts alleged in the complaint included the following:*

1                   b.       *“My review of documents obtained from the California Secretary of State*  
 2 *and the Internet regarding the two STS businesses as well as Wesley Mayder’s businesses, which*  
*show the same street address for STS, Inc. and Wesley Mayder’s businesses.”*

3 **Grounds for Objection:**

4           Irrelevant and immaterial; two entities having the same street address provides no basis for  
 5 concluding wrongdoing by Wes Mayder; lack of foundation.

6 **VERIGY’S RESPONSE TO THE OBJECTION:**

7           The objection should be overruled. See Response to Objection #2 above.

8 **W.MAYDER’S OBJECTION NO. 4:**

9           Fowler Decl. at paragraph 3 re statement about Fowler interviewing Pochowski and Wes  
 10 Mayder’s “active participation in STS, LLC.”

11           3.       *“My investigation into whether Wesley Mayder was liable for the acts alleged in*  
 12 *the complaint included the following:*

13                   c.       *Interview of Robert Pochowski and review of documents produced by him*  
 14 *indicating Wesley Mayder’s active participation in STS, LLC.”*

14 **Grounds for Objection:**

15           Hearsay. Conclusory, lacking evidentiary detail re what “documents” were reviewed, what  
 16 the so-called “active participation” was. “Active participation” does not amount to control, does  
 17 not amount to establishing that Wes Mayder was ever a director or officer of STS LLC. Wes  
 18 Mayder could be actively participating, though he was not, without having any knowledge of or  
 19 hand in any wrongdoing. Lack of foundation.

20 **VERIGY’S RESPONSE TO THE OBJECTION:**

21           The objection should be overruled. See Response to Objection #2 above.

22 **W.MAYDER’S OBJECTION NO. 5:**

23           Fowler Decl. at paragraph 5 re Fowler’s alleged knowledge of the law.

24           *“I also based my recommendation to name Wesley Mayder on my knowledge of existing*  
 25 *law as well as my experience litigating questions of conspiracy, joint venture liability, partner*  
 26 *liability, vicarious liability and alter ego liability for over four decades while representing parties*  
*alleging and defending against similar allegations. In addition, I reviewed legal publications*  
*regarding the factors to be considered for alter ego liability.”*

27 **Grounds for Objection:**

28           Irrelevant; Verigy has not pled a proper conspiracy or alter ego claim, and certainly not

partnership liability; an LLC is a corporation, not a partnership.

**VERIGY'S RESPONSE TO THE OBJECTION:**

The objection should be overruled. The objection is an argument regarding the weight of the information, not its admissibility. Conspiracy is not a cause of action or independent claim for relief but a doctrine of derivative liability. *Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.*, 7 Cal. 4th 503, 510 (1994). Mr. Fowler attests that he had experience litigating claims of derivative liability of various sorts. Such information is relevant, material and admissible concerning the reasonableness of his pre-complaint investigation.

**W.MAYDER'S OBJECTION NO. 6:**

Fowler Decl. at paragraph 6 re ongoing discovery.

*"I also believed at the time I signed the Complaint that actual discovery against the defendants and our investigation would continue to uncover further evidence of Wesley Mayder's liability. Some of this evidence has already turned up in documents and testimony produced by the Mayder brothers themselves, and authenticated by them in deposition testimony."*

**Grounds for Objection:**

Conclusory. Fowler claims that discovery has validated Verigy's suing Wes Mayder, but the exact opposite is true. Fowler fails to point to any single fact or document to substantiate his conclusory statements.

**VERIGY'S RESPONSE TO THE OBJECTION:**

The objection should be overruled. The objection is an argument regarding the weight of the information, not its admissibility. Mr. Fowler's testimony as to his mental state at the time of filing the complaint is relevant to the question whether he violated Rule 11 of the Federal Rules of Civil Procedure and thus admissible. In testifying as to his subjective belief at a particular time, a witness is not required to, nor in most cases could he, point to evidence other than what he recalls that mental state was.

**B. DECLARATION OF ROBERT POCHOWSKI IN OPPOSITION TO  
W.MAYDER'S MOTION FOR RULE 11 SANCTIONS**

**W.MAYDER'S OBJECTION NO. 7:**

("Pochowski Decl.") at paragraph 4, re "we never formalized any involvement."

1           *“Mayder wanted me to invest in STS, and I agreed to explore the idea. At no time did he*  
 2 *ask me to sign a non-disclosure agreement (“NDA”). We never formalized my involvement, and*  
 3 *ultimately, I did not invest in STS. I did share with Romi Mayder a number of concrete ways to*  
 4 *improve the product, including, but not limited to, using a toggle mode.”*

4           **Grounds for Objection:**

5           Judicial estoppel; impeaching testimony to Verigy’s position that Wes Mayder  
 6 “formalized” his involvement with STS LLC while having its witness, Pochowski, testify that his  
 7 involvement was never formalized.

8           **VERIGY’S RESPONSE TO THE OBJECTION:**

9           The objection should be overruled. The objection illogically mis-construes Mr.  
 10 Pochowski’s testimony. Mr. Pochowski’s testimony that “[w]e never formalized *my* involvement”  
 11 in STS, LLC (emphasis added), is *not* inconsistent with Verigy’s position that STS, LLC was  
 12 formalized with *Wes Mayder* as a member.

13           **W.MAYDER’S OBJECTION NO. 8:**

14           Pochowski Decl. at paragraph 5 re statement about Wes Mayder being a “partner” in STS.

15           *“In early September 2006, Romi Mayder informed me that his brother, Wes Mayder,*  
 16 *would be a partner in the company. This was not my original understanding when Romi asked me*  
 17 *to invest in STS in June 2006, and I informed him of my original understanding that we would be*  
 18 *equal partners. Romi Mayder then informed me in mid September, 2006 that he already had*  
 19 *received a large check from his brother and therefore he and his brother would not allow me to be*  
 20 *an equal partner.”*

19           **Grounds for Objection:**

20           Irrelevant and immaterial; lack of foundation. An LLC is not a partnership and there is no  
 21 evidence whatsoever that a partnership was ever formed, nor any claim by Verigy based on  
 22 partnership liability.

23           **VERIGY’S RESPONSE TO THE OBJECTION:**

24           The objection should be overruled. The objection goes to the weight of the evidence, not  
 25 its admissibility. The testimony is background information. Further, neither Romi Mayder nor  
 26 Mr. Pochowski are attorneys and their use of the term “partner” was colloquial. See, also,  
 27 Response to Objection #7 above.

28           //

**W.MAYDER'S OBJECTION NO. 9:**

Pochowski Decl. at paragraph 5 re statement about Pochowski being "equal partners" with Romi Mayder.

*"In early September 2006, Romi Mayder informed me that his brother, Wes Mayder, would be a partner in the company. This was not my original understanding when Romi asked me to invest in STS in June 2006, and I informed him of my original understanding that we would be equal partners. Romi Mayder then informed me in mid September, 2006 that he already had received a large check from his brother and therefore he and his brother would not allow me to be an equal partner."*

**Grounds for Objection:**

Irrelevant and immaterial; lack of foundation. An LLC is not a partnership and there is no evidence whatsoever that a partnership was ever formed, nor any claim by Verigy based on partnership liability.

**VERIGY'S RESPONSE TO THE OBJECTION:**

The objection should be overruled. See Response to Objection #8 above.

**W.MAYDER'S OBJECTION NO. 10:**

Pochowski Decl. at paragraph 6 re statement about Romi Mayder's having sent Pochowski a "draft partnership agreement for STS," a copy of which is attached as Exh. A to the declaration, and re his never having signed a "partnership agreement"

*"On or about September 29, 2006, Romi Mayder sent me a draft partnership agreement for STS. A true and correct copy of what he sent me is attached hereto as Exhibit A. Shortly thereafter, Romi Mayder gave me a hardcopy version of the agreement signed by both Romi Mayder and Wesley Mayder. Attached hereto as Exhibit B is a true and correct copy of the partnership agreement signed by Wes and Romi Mayder. I never signed the partnership agreement."*

**Grounds for Objection:**

Irrelevant and immaterial; lack of foundation. An LLC is not a partnership and there is no evidence whatsoever that a partnership was ever formed, nor any claim by Verigy based on partnership liability; Exh. A shows on its face that it is a draft operating agreement for an LLC, not a partnership.

**VERIGY'S RESPONSE TO THE OBJECTION:**

The objection should be overruled. See Response to Objection #8 above.



**W.MAYDER'S OBJECTION NO. 11:**

Pochowski Decl. at paragraph 6 re statement about Romi Mayder and Wes Mayder having allegedly signed a "partnership agreement for STS," a copy of which is attached as Exh. B to the declaration

*"On or about September 29, 2006, Romi Mayder sent me a draft partnership agreement for STS. A true and correct copy of what he sent me is attached hereto as Exhibit A. Shortly thereafter, Romi Mayder gave me a hardcopy version of the agreement signed by both Romi Mayder and Wesley Mayder. Attached hereto as Exhibit B is a true and correct copy of the partnership agreement signed by Wes and Romi Mayder. I never signed the partnership agreement."*

**Grounds for Objection:**

Irrelevant and immaterial; lack of foundation. An LLC is not a partnership and there is no evidence whatsoever that a partnership was ever formed, nor any claim by Verigy based on partnership liability; Exh. B shows on its face that it is a draft operating agreement for an LLC, not a partnership.

**VERIGY'S RESPONSE TO THE OBJECTION:**

The objection should be overruled. See Response to Objection #8 above.

**W.MAYDER'S OBJECTION NO. 12:**

Pochowski Decl. at paragraph 7 re statement about Romi Mayder and Pochowski having allegedly discussed the "partnership agreement" many times

*"Romi Mayder and I discussed the partnership agreement numerous times throughout October and November. I continued to ask that Wes Mayder be removed from the partnership, but Romi Mayder kept refusing. Finally, on or about November 22, 2006, I agreed to Wes Mayder's inclusion and to reduce my percentage of ownership, but asked that the partnership agreement be changed to have two levels of membership, and that Wes Mayder would be in the second class of membership as a silent investor only, with no management participation allowed. Romi Mayder initially agreed to my request."*

**Grounds for Objection:**

Irrelevant and immaterial; lack of foundation. An LLC is not a partnership and there is no evidence whatsoever that a partnership was ever formed, nor any claim by Verigy based on partnership liability; Exhs. A and B shows on their faces that they are draft operating agreements for an LLC, not a partnership.

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**VERIGY'S RESPONSE TO THE OBJECTION:**

The objection should be overruled. See Response to Objection #8 above.

**W.MAYDER'S OBJECTION NO. 13:**

Pochowski Decl. at paragraph 7 re statement about his allegedly asking that Wes Mayder be removed from "the partnership"

*"Romi Mayder and I discussed the partnership agreement numerous times throughout October and November. I continued to ask that Wes Mayder be removed from the partnership, but Romi Mayder kept refusing. Finally, on or about November 22, 2006, I agreed to Wes Mayder's inclusion and to reduce my percentage of ownership, but asked that the partnership agreement be changed to have two levels of membership, and that Wes Mayder would be in the second class of membership as a silent investor only, with no management participation allowed. Romi Mayder initially agreed to my request."*

**Grounds for Objection:**

Irrelevant and immaterial; lack of foundation. An LLC is not a partnership and there is no evidence whatsoever that a partnership was ever formed, nor any claim by Verigy based on partnership liability; Exhs. A and B shows on their faces that they are draft operating agreements for an LLC, not a partnership.

**VERIGY'S RESPONSE TO THE OBJECTION:**

The objection should be overruled. See Response to Objection #8 above.

**W.MAYDER'S OBJECTION NO. 14:**

Pochowski Decl. at paragraph 7 re statements about partnership agreement being changed to have two levels of "membership"

*"Romi Mayder and I discussed the partnership agreement numerous times throughout October and November. I continued to ask that Wes Mayder be removed from the partnership, but Romi Mayder kept refusing. Finally, on or about November 22, 2006, I agreed to Wes Mayder's inclusion and to reduce my percentage of ownership, but asked that the partnership agreement be changed to have two levels of membership, and that Wes Mayder would be in the second class of membership as a silent investor only, with no management participation allowed. Romi Mayder initially agreed to my request."*

**Grounds for Objection:**

Irrelevant and immaterial; lack of foundation. An LLC is not a partnership and there is no evidence whatsoever that a partnership was ever formed, nor any claim by Verigy based on partnership liability; Exhs. A and B shows on their faces that they are draft operating agreements for an LLC, not a partnership.

1 **VERIGY'S RESPONSE TO THE OBJECTION:**

2 The objection should be overruled. See Response to Objection #8 above.

3 **W.MAYDER'S OBJECTION NO. 15:**

4 Pochowski Decl. at paragraph 8 re statement about the "one level of participating  
5 partnership"

6 *"I continued to discuss these issues with Romi Mayder, and we planned to meet together*  
7 *with his corporate attorney to finalize the agreement in early December 2006. On December 11,*  
8 *2006, I sent Romi Mayder an email to confirm my proposed final changes. Without any warning, I*  
9 *received an email from Romi Mayder that same day, stating that he had reviewed my "*

10 *He then informed me*

11 *which had one level of participating partnership with the three of*  
12 *us as partners. Attached hereto as Exhibit C is a true and correct copy of the December 2006*  
13 *email string between Romi Mayder and me."*

14 **Grounds for Objection:**

15 Irrelevant and immaterial; lack of foundation. An LLC is not a partnership and there is no  
16 evidence whatsoever that a partnership was ever formed, nor any claim by Verigy based on  
17 partnership liability; Exhs. A and B shows on their faces that they are draft operating agreements  
18 for an LLC, not a partnership.

19 **VERIGY'S RESPONSE TO THE OBJECTION:**

20 The objection should be overruled. See Response to Objection #8 above.

21 **C. VERIGY'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION**  
22 **TO WESLEY MAYDER'S MOTION FOR SUMMARY JUDGMENT**

23 **W.MAYDER'S OBJECTION NO. 16:**

24 ("Opp. to WM SJ") at p. 1, Ins. 8-10 re Wes Mayder's involvement with STS

25 *"(collectively, the "STS Entities"), and by Romi Mayder's brother and co-conspirator, defendant*  
26 *Wes Mayder, who invested in both STS Entities, was a Member of STS LLC and a boardmember*  
27 *of STS, Inc."*

28 **Grounds for Objection:**

Irrelevant and immaterial to the extent Wes Mayder "invested" in the STS entities, as such  
investment does not create liability, are re his being a "member" of STS LLC, as mere  
membership creates no tort liability as has been alleged by Verigy, and re his being a co-

1 conspirator, in that Verigy has failed to plead or adduce any of the evidence needed to demonstrate  
2 conspiracy; incompetent evidence regarding Wes Mayder being a “boardmember” of STS, Inc.

3 **VERIGY’S RESPONSE TO THE OBJECTION:**

4 The objection should be overruled. This is an objection to argument and to advocacy, not  
5 an objection to evidence. Further, the argument being objected to is supported by evidence  
6 elsewhere in the record. And, the evidence of Wes Mayder’s actual role in the STS Entities is  
7 highly relevant, not in least part because it impeaches the credibility of Wes Mayder, who has  
8 submitted false and misleading, and perhaps perjurious, sworn statements to this Court denying  
9 the nature of his participation in the STS Entities.

10 **W.MAYDER’S OBJECTION NO. 17:**

11 Opp. to WM SJ at p. 1, lns. 15-16 re Romi Mayder allegedly marketing a product “very  
12 similar to Verigy’s products”

13 *“In early July 2007, Verigy learned that Romi Mayder was marketing a product very*  
14 *similar to Verigy’s products and began an investigation to determine whether Romi Mayder was*  
*using”*

15 **Grounds for Objection:**

16 Lack of foundation; attorney speculation and argument; the Court has already found that  
17 Verigy is *not* marketing a product of the nature of FlashEnhancer; lack of competent testimony to  
18 establish the same.

19 **VERIGY’S RESPONSE TO THE OBJECTION:**

20 The objection should be overruled. This is an objection to argument and to advocacy, not  
21 an objection to evidence. Further, the argument being objected to is supported by evidence  
22 elsewhere in the record.

23 **W.MAYDER’S OBJECTION NO. 18:**

24 Opp. to WM SJ at p. 1, lns. 20-21 re Verigy’s investigation having “revealed that Romi  
25 Mayder had misappropriated and was using Verigy’s trade secrets”

26 *“On August 22, 2007, after Verigy’s investigation revealed that Romi Mayder had*  
27 *misappropriated and was using Verigy’s trade secrets, Verigy filed this action and sought a”*

28 **Grounds for Objection:**

Lack of foundation; attorney speculation and argument; conclusory with no competent evidence to support it.

**VERIGY'S RESPONSE TO THE OBJECTION:**

The objection should be overruled. This is an objection to argument and to advocacy, not an objection to evidence. Further, the argument being objected to is supported by evidence elsewhere in the record.

**W.MAYDER'S OBJECTION NO. 19:**

Opp. to WM SJ at p. 2, lns. 6-7 re Wes Mayder's alleged "operational role" in STS LLC and STS, Inc.

*"contention. Contemporaneous documentary evidence indicates that Wes Mayder had an operational role in both STS Entities. Wes Mayder was, based on his own signature on the"*

**Grounds for Objection:**

Irrelevant and immaterial; "operational role," even were it true, which it was not, does not create a basis for tort or vicarious liability.

**VERIGY'S RESPONSE TO THE OBJECTION:**

The objection should be overruled. See Response to Objection #16 above.

**W.MAYDER'S OBJECTION NO. 20:**

Opp. to WM SJ at p. 2, lns. \_\_\_\_ [line numbers omitted] Re Wes Mayder's having become a member of STS LLC

*"Wes Mayder was, based on his own signature on the operating agreement, a "member" of STS LLC, and Wes Mayder was, based on Romi Mayder's repeated contemporaneous admissions, a director of STS, Inc."*

**Grounds for Objection:**

Irrelevant and immaterial; mere membership in an LLC, which in fact was never consummated, does not create a basis for tort or vicarious liability.

**VERIGY'S RESPONSE TO THE OBJECTION:**

The objection should be overruled. See Response to Objection #16 above.

**W.MAYDER'S OBJECTION NO. 21:**

Opp. to WM SJ at pp. 3-13 re civil conspiracy

1 ““The moving party bears the initial burden of demonstrating the absence of a ‘genuine  
2 issue of material fact for trial.’” *Miller v. Glenn Miller Productions, Inc.*, 454 F.3d 975, 987 (9<sup>th</sup>  
Cir. 2006) quoting, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

3 “(I)n ruling on a motion for summary judgment, the nonmoving party’s evidence ‘is to be  
4 believed, and all justifiable inferences are to be drawn in [(that party’s)] favor.’” *Miller*, 454  
F.3d at 988, quoting, *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999).

5 **A. Wes Mayder is Not Entitled to Summary Judgment Because There are Genuinely  
6 Disputed Material Issues of Fact Concerning Wes Mayder’s Involvement as a  
7 Conspirator in the Theft of Verigy’s Intellectual Property.**

8 “A civil conspiracy occurs when the parties have reached ‘a unity of purpose or a common  
9 design and understanding, or a meeting of the minds in an unlawful arrangement.’” *Transgo, Inc.*  
10 *v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1020 (9<sup>th</sup> Cir. 1985), quoting *American*  
11 *Tobacco Co. v. United States*, 328 U.S. 781, 809-810 (1946). “A conspiracy must be looked at as  
12 a whole, and acts which are in themselves legal lose that character when they become constituent  
13 elements of an unlawful scheme.” *Transgo*, 768 F.2d at 1020-21.

14 “The existence of a civil conspiracy makes each participant in the wrongful act  
15 responsible as a joint tortfeasor for all damages resulting from the wrong, whether or not a  
16 participant was a direct actor and regardless of the degree of his activity.” *Klistoff v. Superior*  
17 *Court*, 157 Cal. App. 4<sup>th</sup> 469, 479 (2007) (emphasis added). “By participation in a civil  
18 conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators  
19 within the ambit of the conspiracy.” *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7  
20 Cal.4<sup>th</sup> 503, 510-11 (1994).

21 Here, as shown below, Wes Mayder was an active co-conspirator in his brother’s  
22 activities, regardless of his formal position in the STS Entities. And, as his brother’s co-  
23 conspirator, Wes Mayder is equally liable for Romi Mayder’s misconduct. See, *Transgo*, 768 F.2d  
24 at 1023 (As co-conspirators, the defendants were found to be joint tortfeasors, jointly and  
25 severally liable for all compensatory damages awarded . . .); *Klistoff*, 157 Cal. App. 4<sup>th</sup> at 479. At  
26 the very least, there are genuinely disputed material issues of fact whether Wes Mayder conspired  
27 with his brother in connection with the misuse of Verigy’s intellectual property, thereby  
28 precluding summary judgment.

1 **I. Wes Mayder Agreed to Become a Member of STS, LLC.**

2 Wes Mayder contends in his summary judgment motion that “[h]e is not involved in his  
3 brother’s business, has no background at all in the semiconductor industry . . . has no ownership  
4 interest in defendant STS LLC, nor has he ever . . . had an ownership interest therein.” (Motion,  
5 at pp. 2-3) (emphasis added). These assertions are not supported by Wes Mayder’s sworn  
6 declaration (which is highly misleading and which Wes Mayder, in material respects, disavowed  
7 at his deposition.) Further, the assertions are belied by documentary evidence proving that, in  
8 fact, Wes Mayder was involved with his brother in the semiconductor industry and did have an  
9 ownership interest in his brother’s business.

10 Wes Mayder, along with his brother Romi Mayder, signed the operating agreement in STS  
11 LLC, made as of October 11, 2006, which designates Wes Mayder as a “Member” of the LLC,  
12 with a 20 percent ownership stake in such limited liability company based on a \$250,000 capital  
13 contribution. (See, *Pochowski Decl.*, ¶ 6 and Ex. A; see also, *Gagliardi Decl.*, ¶ 2 and Ex. A (Wes  
14 Mayder Depo.Tr., at 46:12 – 47:23; 50:1-10; 51:18 – 52:2; 211:11 – 214:3 and Ex. 91) (copy of  
15 STS LLC Operating Agreement signed by Wes Mayder)). Although the Operating Agreement was  
16 never signed by Pochowski, the document is nevertheless admissible evidence that the Mayder  
17 brothers, each of whom did sign it, were engaged in a joint enterprise involving semiconductor  
18 device testing, STS LLC. On its face, the document evinces “the intent of each Member . . . to  
19 actively engage in the management” of the enterprise’s business, “Semiconductor Device  
20 Testing.” (*Pochowski Decl.*, Ex. A, ¶ 4.1; *Wes Mayder Depo.Tr.*, Ex. 91, ¶ 4.1) (emphasis added).



1 As mentioned, Wes Mayder affixed his signature to this document.<sup>1</sup> “The existence  
2 of an LLC begins upon the filing of articles of incorporation by the Secretary of State. . . To validly  
3 complete the formation of an LLC, the members must enter into an operating agreement either  
4 before or after filing the articles. But the operating agreement need not be in writing; indeed it  
5 may consist of no more than an oral agreement among the initial members to organize the limited  
6 liability company!” 1 Friedman, *California Practice Guide: Corporations*, ¶¶ 2:36:30 & 2:36:32  
7 (2007), at p.2-17, citing Cal. Corps. Code §§ 17001(b) & 17050(a) (emphasis added). Here, by  
8 signing the written operating agreement both Romi Mayder and Wes Mayder evinced their intent  
9 to, and did, complete the formation the STS LLC, of which they were both members.

10 Moreover, even if arguendo the STS LLC entity was never legally consummated in the  
11 absence of Pochowski’s signature on the Operating Agreement, Wes Mayder’s signature on the  
12 document evidences factually the brothers’ conspiracy to operate a company engaged in the  
13 semiconductor device testing industry – using Verigy’s technology. Wes Mayder’s signature on  
14 the Operating Agreement is written contemporaneous evidence of his agreement to join his  
15 brother Romi Mayder’s illicit enterprise. It is evidence of his participation in an unlawful  
16 conspiracy and thereby exposes him to joint and several liability for his brother’s actions in  
17 furtherance of the conspiracy. This is true whether or not Wes Mayder was a direct actor and  
18 regardless of the degree of his activity (or whether he knew anything about the semiconductor  
19 device testing industry). *Klistoff*, 157 Cal. App. 4<sup>th</sup> at 479.

20 Wes Mayder’s conspiracy is further evidenced by a letter from the brothers’ corporate  
21 attorney, Daniel E. Hanley, to Pochowski, dated December 13, 2006:

Dear Mr. Pochowski:

We are attorneys for Silicon Test Solutions, LLC (STS).

When we formed STS on September 8, 2006, we were advised by Romi Mayder  
that the members would be Romi, Romi’s brother Wesley and yourself. . . .

On that basis, we prepared the Operating Agreement, which details the ownership  
interest in STS. . . .

Neither Romi or his brother care to act as co-owner with you. On behalf of the  
Mayders their offer to you to be a member of STS is hereby terminated. . . .

Very truly yours,

[signature]

Daniel E. Hanley

(See, *Pochowski Decl.*, ¶ 9 and Ex. D (emphasis added)). This letter makes amply clear that the  
joint enterprise in which both Romi and Wes Mayder were each involved would proceed even  
without Pochowski. Likewise, Romi Mayder characterized his brother [REDACTED]

[REDACTED] (*Gagliardi Decl.*, ¶ 2  
and Ex. A (Wes Mayder Depo.Tr. at 40:20 – 41:13; 42:18 – 43:21 and Ex. 90)). Further, Wes  
Mayder admitted at deposition that he made a \$250,000 capital contribution to STS LLC to secure  
his ownership stake in STS LLC. (*Id.*, at 31:14 – 38:21; 83:20 – 86:7 and Ex. 94)).

Any contention that Wes Mayder never held an ownership stake in STS LLC is simply and  
demonstrably false. At the very least, the evidence raises a genuine dispute of material fact as to

<sup>1</sup> Confronted at his deposition with his signature on the STS LLC Operating Agreement,  
Wes Mayder testified he did not recall signing it but admitted that the signature looked “similar”  
to his own, and he could not deny that it was, in fact, his. (*Gagliardi Decl.*, ¶ 2 and Ex. A (Wes  
Mayder Depo.Tr. at 46:12 – 47:23; 50:1-10; 51:18 – 52:2; 211:11 – 214:3 and Ex. 91). Wes  
Mayder also testified that he was retracting parts of sworn declaration in which he denied signing  
the STS LLC Operating Agreement. (*Id.*, at 52:12 – 54:11).

1 Wes Mayder's involvement in the management of STS LLC and whether he agreed to join in a  
 2 conspiracy with his brother to illegally profit from the use of Verigy's technology.

3 **2. Wes Mayder Is, or Was at Relevant Times, a Director of STS, Inc.**

4 Wes Mayder also contends that he has "no board position, no officership, no employee  
 5 standing, and no operating role whatsoever" in STS, Inc. (Motion, at p.3, citing, Wes Mayder  
 6 Decl., ¶¶ 12-13). However, these contentions are also contradicted by documentary evidence  
 7 produced by defendants in this action.

8 In an email string on July 3, 2007, which Wes Mayder authenticated at his deposition,

9 [REDACTED] (Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo.Tr. at 124:20  
 10 – 127:8 and Ex. 100.)) Wes Mayder was copied on the email. (Id.) Similarly, in an email string  
 11 on July 9, 2007, Romi Mayder wrote to Wes Mayder and Francois, stating:

12 [REDACTED] (Id., Wes Mayder Depo.Tr. at 142:2 – 143:23 and Ex. 102) (emphasis added.) Wes  
 13 Mayder received the email string and responded to it. (Id.)<sup>2</sup> Accordingly, there are at least  
 14 genuinely disputed issues of material fact whether Wes Mayder was or is as a member of the  
 15 board of directors of STS, Inc.

16 As a director of STS, Inc., Wes Mayder is subject to liability based on his investment in and  
 17 control of the company if he knew or had reason to know of misappropriation of a competitor's  
 18 trade secrets. "A corporate director or officer's participation in tortious conduct may be shown  
 19 not solely by direct action but also by knowing consent to or approval of unlawful acts." *PMC,*  
 20 *Inc. v. Kadisha*, 78 Cal. App. 4<sup>th</sup> 1368, 1380 (2000). "To maintain a tort claim against a director  
 21 in his or her personal capacity, a plaintiff must first show that the director specifically authorized,  
 22 directed or participated in the allegedly tortious conduct (citation); or that although they  
 23 specifically knew or reasonably should have known that some hazardous condition or activity  
 24 under their control could injure plaintiff, they negligently failed to take or order appropriate  
 25 action to avoid the harm (citations)." *Id.*, quoting, *Frances T. v. Village Green Owners Assn.*, 42  
 26 Cal.3d 490, 508-09 (1986) (emphasis by Kadisha court).

27 Here, Wes Mayder, as a director of STS, Inc., either knew or reasonably should have  
 28 known – before the lawsuit was filed in late August 2007 – that STS, Inc. was born of his brother's  
 29 duplicity in taking technology from Verigy. In early July 2007, counsel for Verigy sent a pair of  
 30 letters to Romi Mayder raising effectively the same allegations made in this lawsuit which were  
 31 immediately forwarded to Wes Mayder (but notably not to other minority shareholders, an action  
 32 in itself suggesting that Wes Mayder was more than merely a passive investor, but instead his  
 33 brother's co-conspirator). (Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo. Tr. at 132:12 –  
 34 136:8; 170:2 – 175:6 and Exs. 101 & 104).) Upon receiving these direct allegations of  
 35 wrongdoing, Wes Mayder failed to take or order appropriate action and admitted at his deposition  
 36 that he performed no investigation whatsoever into the allegations other than to ask his brother's  
 37 opinion of them. (Id.) Wes Mayder further admitted that he accepted "on faith" everything his  
 38 brother told him, notwithstanding that his brother frequently told him things which were false.  
 39 (Id., at 175-1-6.) Such "head-in-the-sand" behavior was negligent, objectively unreasonable and  
 40 precisely the sort of behavior rendering him liable for the misdeeds of the company under the  
 41 doctrine enunciated in *Kadisha*. Accordingly, summary judgment absolving him from any  
 42 potential liability is inappropriate.

43 **3. Wes Mayder Was Not Merely a Passive Minority Shareholder but Instead  
 44 an Active Co-Conspirator with his Brother Romi Mayder.**

45 Wes Mayder argues repeatedly that he was "solely a passive, minority shareholder" in  
 46 Romi Mayder's company, STS, Inc. (Motion, at p.1; see also *id.*, at pp.2, 8, 9, 10 & 11; Wes

26 <sup>2</sup> Defendants also deny that Francois was ever a member of STS, Inc.'s board of directors,  
 27 but Romi Mayder told him otherwise. (Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo.Tr. at  
 28 124:20 – 127:8; 142:2 – 143:23 and Exs. 110 & 102).) Further, it would appear Francois believed  
 him, because, as of July 8, 2008, Francois was touting himself on the internet as a "founding  
 Director of Silicon Test Systems in San Jose, CA." (Id., Ex. 110).



1 *Mayder Decl.*, ¶ 7 (“I am only a passive shareholder”).). However, this assertion is nonsense,  
 2 *belied by Wes Mayder’s own admissions about his active role in the operations of company (and*  
*its predecessor STS LLC), whether or not he was formally a member of STS, Inc.’s board of*  
*directors.*

3 **a. Wes Mayder Solicited Investors for STS, Inc.**

4 *Wes Mayder, based on his own deposition testimony, was actively involved in the effort to*  
*secure investors for STS, Inc.* [REDACTED] (*Gagliardi*  
 5 *Decl.*, ¶ 2 and Ex. A (*Wes Mayder Depo.Tr. at 56:11 – 59:10 and Ex. 92).*)  
 6 [REDACTED] (*Id.*, at 65:11 – 70:12 and Ex. 93)

7 [REDACTED]  
 8 [REDACTED] (*Gagliardi Decl.*, ¶¶ 2-3 and  
 9 Ex. A (*Wes Mayder Depo.Tr. at 59:11 – 60:2*) and Ex. B (*Davidson Depo.Tr. at 70:4 – 71:8*).)  
*Fund-raising for a start-up company is not the domain of a merely passive investor.*

10 **b. Wes Mayder Used His Driver’s License for a Seller’s Permit for**  
**STS, Inc.**

11 *Wes Mayder, by his own admission at deposition, was also actively involved in* [REDACTED]  
 12 [REDACTED] (*Gagliardi Decl.*, ¶ 2 and Ex. A (*Wes Mayder Depo.Tr. at 118:11 – 124:18 and Exs. 97-99*).) *On*  
 13 *March 29, 2007, Romi Mayder emailed his brother.* [REDACTED]

14 [REDACTED] (*Id.*, ex. 97). *Later the same day, Romi Mayder emailed back*  
 15 *indicating that* [REDACTED]

16 [REDACTED] (*Id.*, ex. 98). *Romi Mayder then*  
 17 *emailed and* [REDACTED]

18 [REDACTED] (*Id.*, ex. 99). *Wes Mayder* [REDACTED] (*Gagliardi Decl.*, ¶ 2 and  
 19 Ex. A (*Wes Mayder Depo.Tr. at 124:3-18*).) *Yet he was unable to explain why information from a*  
 20 *merely passive investor would be required for a seller’s permit.* (*Id.*, at 123:17-19.).<sup>3</sup>

21 **c. Wes Mayder Operated the STS, Inc. Website**

22 *Wes Mayder, by his own admission, designed the STS, Inc. website.* (*Wes Mayder Decl.*,  
 23 ¶¶ 14 & 16.). *But he denies that either he or his company, WeDirect, ever hosted a website for*  
 24 *STS, Inc. or his brother.* (*Id.*, ¶ 16).

25 *Once again, the contemporaneous documentary* [REDACTED]  
 26 [REDACTED]  
 27 (*Gagliardi Decl.*, ¶ 2 and Ex. A (*Wes Mayder Depo.Tr. at 155:19 – 159:12 and ex. 103*) (*emphasis*  
 28 *added*.) *The letter from Verigy alluded to by Romi Mayder was a letter dated July 9, 2007 (the*  
*previous day) from Verigy’s counsel to Romi Mayder, which Romi forwarded to Wes Mayder, in*  
*which counsel stated: “Your website at [www.silicontest.com](http://www.silicontest.com) shows that you and your STS Entities*  
*have been promoting products that appear to incorporate confidential technology you worked on*  
*at Verigy.”* (*Id.*, at 170:2-23 and ex. 104). *Wes Mayder testified at his deposition that* [REDACTED]  
 [REDACTED] (*Id.*, at 159:7-12).

3 In fact, in California a driver’s license is required for a sellers permit of owners or partners,  
 officers or members of a corporate entity pursuant to the online application materials (See,  
*Gagliardi Decl.*, ¶ 4 and Ex. C.).

Not only does Wes Mayder's conduct [REDACTED] show that he was operating the website (in direct contradiction of his sworn declaration), and show therefore that he was more than a passive investor (again, in direct contradiction of his sworn declaration), it also shows consciousness of guilt. The email Romi Mayder sent to his brother was short on verbiage but deeply pregnant with meaning that could only have been understood by a co-conspirator. The email says, in effect, [REDACTED] In other words, "they're on to us." Wes Mayder willingly complied without asking questions because he knew already that the website contained Verigy trade secret information – and he knew that he, Wes Mayder, had posted it on the website that he designed and hosted. Wes Mayder was clearly a co-conspirator of his brother Romi Mayder. At the very least, a factfinder is entitled to make that determination based on the evidence at trial, thereby precluding summary judgment.

**d. Wes Mayder Was Involved in the Willful Backdating of Romi Mayder's Inventor's Notebook.**

Wes Mayder also actively conspired with his brother Romi Mayder in the backdating of Romi Mayder's inventor's notebook – a false and fraudulent activity in direct furtherance of their conspiracy to steal Verigy's intellectual property.

Wes Mayder admitted at his deposition receiving an email from his brother Romi Mayder on January 17, 2007 asking Wes Mayder to supply someone to witness entries in Romi Mayder's inventor's notebook and stated: [REDACTED]

[REDACTED] (Gagliardi Decl., ¶ 2 and A (Wes Mayder Depo.Tr. at 89:1 – 91:3; 101:8 – 102:20 and ex. 7) (emphasis added).) Wes Mayder replied by email the same day, offering up his employee, Jon Davidson, without questioning the legality or ethics of the task assigned. (Id.) [REDACTED] Mayder never took issue with Romi Mayder's explicit request for assistance in falsifying records; instead, he dutifully complied. (Id.)

And, in fact, Romi Mayder's inventor's notebook was falsified by Davidson, whose declaration and deposition testimony are at odds with each other and at odds with the contemporaneous emails regarding the subject. The January 17, 2007 email string makes clear that [REDACTED] (See, Gagliardi Decl., ¶ 2 and A (Wes Mayder Depo.Tr. at 110:6-18 (conceding this truism).) Yet, Davidson swears under penalty of perjury in his declaration that the request for him to do so was made a month earlier:

In mid-December 2006, Romi [Mayder] sent an email to Wesley [Mayder] asking about obtaining verification of dates applicable to his lab notebook. Since I had spoken several times with Romi [Mayder] about his work at STS LLC, Wesley knew that I would be a good person for Romi to be referred to. I reviewed Romi's notebook, and based on my recollection of our discussions, I tried to sign with dates corresponding to approximately when we discussed the information. Wesley never directed me to do anything false or anything wrongful, nor would I do so.

(Davidson Decl., ¶ 7) (emphasis added). Thus, Davidson admits to backdating Romi Mayder's inventor's notebook but vainly denies that it amounts to anything "false" or "wrongful."

However, in contradiction of Davidson's own declaration, Davidson swears under oath in his deposition testimony [REDACTED]

[REDACTED] (Gagliardi Decl., ¶ 3 and Ex. B (Davidson Depo.Tr. at 34:24 – 35:14; 44:10 – 45:19).) In other words, Davidson [REDACTED]

[REDACTED] (Id., at 85:1 – 90:17 and ex. 6) (copy of the notebook).) Davidson's deposition testimony and declaration simply cannot be harmonized – one or both must be untrue on the subject of backdating the notebook, and indeed both are. Neither Davidson's declaration nor his deposition testimony is consistent with the definitive, contemporaneous documentary evidence that the original request for Davidson to witness and endorse the notebook was not made

1 until January 17, 2007 and therefore Davidson simply could not have done so beforehand.<sup>4</sup> Thus,  
 2 Davidson (whose only connection to Romi Mayder is that he is Wes Mayder's employee offered up  
 by Wes Mayder for the job of falsifying records) is utterly discredited as a witness.

3 Although it is unknown just when Davidson signed Romi Mayder's notebook, what is  
 4 known is that it had to be after January 17, 2007 (rendering Davidson's declaration and  
 deposition testimony utterly impossible), that it involved falsifying records, and that Wes Mayder  
 was inextricably involved in this scheme.

5 [REDACTED]  
 6 The evidence is thus overwhelming that Wes Mayder is thoroughly entangled with Romi  
 Mayder's misdeeds involving the theft of Verigy's technology. Plainly, Wes Mayder was an  
 7 integral part of the conspiracy with his brother Romi Mayder to tamper with evidence of the real  
 ownership of STS, Inc.'s purported intellectual property. Wes Mayder's assertion that he would  
 never do anything false or fraudulent is completely incredible in light of this evidence. Certainly,  
 8 at the very least, there remain genuine issues of material fact precluding summary judgment.

9 **B. Wes Mayder is Not Entitled Summary Adjudication of Any of the Claims for  
 Relief Against Him.**

10 The Complaint asserts 14 claims for relief. Of these, 12 are asserted against Wes Mayder:  
 misappropriation of trade secrets, violation of the Computer Fraud and Abuse Act, 18 U.S.C. §  
 11 1030, violation of the Electronic Communications Privacy Act, 18 U.S.C. § 2701 et seq., violation  
 of California Penal Code § 502, unfair competition in violation of California Business &  
 Professions Code § 17200 et seq., common law unfair competition, violation of the Lanham Act,  
 12 15 U.S.C. § 1125(a), false advertising in violation of California Business & Professions Code §  
 17500, intentional interference with prospective economic advantage, declaratory relief,  
 13 imposition of a constructive trust, and unjust enrichment."

14 Wes Mayder argues that "any legal arguments that implicate Wesley [Mayder] for any  
 alleged wrongdoing, including but not limited to allegations of trade secret misappropriation  
 against Wesley Mayder, are meritless." (Motion, at p.4) (emphasis added). However, based on  
 15 the foregoing, exactly the opposite is true. The evidence demonstrates, as opposed to the self-  
 serving declarations concocted in support of this motion, that Wes Mayder conspired with his  
 16 brother Romi Mayder and is thus legally liable for everything Romi Mayder is liable for arising  
 out of the conspiracy. *Transgo, Inc.*, 768 F.2d at 1023; *Klistoff*, 157 Cal. App. 4<sup>th</sup> at 479.

17 Accordingly, Wes Mayder is not entitled to summary adjudication of any of the individual  
 claims asserted against him.

18 **IV. CONCLUSION**

19 For the foregoing reasons, Verigy and its counsel respectfully request that the Court deny  
 in its entirety Wes Mayder's motion for summary judgment."

20 **Grounds for Objection:**

21 Lack of foundation; irrelevant and immaterial. Verigy has failed to plead any facts in its  
 22 Complaint that would be required for it to be able to proceed on a civil conspiracy basis as set  
 23 forth in CACI 3600.

24  
 25 <sup>4</sup> [REDACTED]  
 26 [REDACTED]  
 27 [REDACTED]  
 28 [REDACTED]

1 //

2 **VERIGY'S RESPONSE TO THE OBJECTION:**

3 The objection should be overruled. The objection is an argument regarding the weight of  
4 the information, not its admissibility. Conspiracy is not a cause of action or independent claim for  
5 relief but a doctrine of derivative liability. *Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.*,  
6 7 Cal. 4th 503, 510 (1994). Mr. Fowler attests that he had experience litigating claims of  
7 derivative liability of various sorts. Such information is relevant, material and admissible  
8 concerning the reasonableness of his pre-complaint investigation.

9 **W.MAYDER'S OBJECTION NO. 22:**

10 Opp. to WM SJ at P. 3, Ins. 21-23 re Wes Mayder being a co-conspirator and liable for the  
11 acts of his brother Romi

12 *"Here, as shown below, Wes Mayder was an active co-conspirator in his brother's*  
13 *activities, regardless of his formal position in the STS Entities. And, as his brother's co-*  
14 *conspirator, Wes Mayder is equally liable for Romi Mayder's misconduct. See, Transgo, 768 F.2d*  
*at 1023 (As co-"*

15 **Grounds for Objection:**

16 Lack of foundation; irrelevant and immaterial. Verigy has failed to plead any facts in its  
17 Complaint that would be required for it to be able to proceed on a civil conspiracy basis as set  
18 forth in CACI 3600.

19 **VERIGY'S RESPONSE TO THE OBJECTION:**

20 The objection should be overruled. See Response to Objection #5 above.

21 **W.MAYDER'S OBJECTION NO. 23:**

22 Opp. to WM SJ at p. 4, ln. 23-p. 5, ln. 7 re LLC required to have an operating agreement,  
23 reference to oral operating agreement being sufficient

24 *"of an LLC begins upon the filing of articles of incorporation by the Secretary of State. . . To*  
25 *validly complete the formation of an LLC, the members must enter into an operating agreement*  
26 *either before or after filing the articles. But the operating agreement need not be in writing;*  
27 *indeed it may consist of no more than an oral agreement among the initial members to organize*  
*the limited liability company!" 1 Friedman, California Practice Guide: Corporations, ¶¶ 2:36:30*  
*& 2:36:32 (2007), at p.2-17, citing Cal. Corps. Code §§ 17001(b) & 17050(a) (emphasis added).*  
*Here, by signing the written operating agreement both Romi Mayder and Wes Mayder evinced*  
*their intent to, and did, complete the formation the STS LLC, of which they were both members."*

28

**Grounds for Objection:**

Irrelevant and immaterial; lack of foundation. Verigy has made an admission against interest that to be valid the LLC had to have a completed operating agreement; the LLC operating agreement that Verigy is relying upon required the signature of *three members, including Mr. Pochowski who admits he never signed it*. There is no evidence of any “oral” operating agreement between Romi and Wes Mayder, and by Verigy’s own assertion, no valid LLC was ever formed.

**VERIGY’S RESPONSE TO THE OBJECTION:**

The objection should be overruled. See Response to Objection #7 above.

**W.MAYDER’S OBJECTION NO. 24:**

Opp. to WM SJ at p. 5, lns. 8-17 re the signatures of the Mayder brothers on the draft operating agreement constituting evidence of a conspiracy to operate a company using Verigy’s technology

*“Moreover, even if arguendo the STS LLC entity was never legally consummated in the absence of Pochowski’s signature on the Operating Agreement, Wes Mayder’s signature on the document evidences factually the brothers’ conspiracy to operate a company engaged in the semiconductor device testing industry – using Verigy’s technology. Wes Mayder’s signature on the Operating Agreement is written contemporaneous evidence of his agreement to join his brother Romi Mayder’s illicit enterprise. It is evidence of his participation in an unlawful conspiracy and thereby exposes him to joint and several liability for his brother’s actions in furtherance of the conspiracy. This is true whether or not Wes Mayder was a direct actor and regardless of the degree of his activity (or whether he knew anything about the semiconductor device testing industry). Klistoff, 157 Cal. App. 4<sup>th</sup> at 479.”*

**Grounds for Objection:**

Lack of foundation; incompetent evidence; irrelevant and immaterial. Mere signatures on an operating agreement constitute no evidence of a conspiracy, and there is no evidence of knowledge by Wes Mayder to use any Verigy technology. Being willing to join an LLC does not evidence anything about a conspiracy or any tortuous conduct.

**VERIGY’S RESPONSE TO THE OBJECTION:**

The objection should be overruled. See Response to Objection #5 above. “A civil conspiracy occurs when the parties have reached ‘a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.’” *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1020 (9<sup>th</sup> Cir. 1985) (citations omitted). Wes Mayder’s



signature on the STS, LLC evinced, and is evidence of, his meeting of minds with his brother in an unlawful arrangement to compete with Verigy using its stolen technology.

**W.MAYDER'S OBJECTION NO. 25:**

Opp. to WM SJ at p. 5, ln. 18-p. 6, ln. 3 re letter from attorney for Romi Mayder constituting evidence of conspiracy

*"Wes Mayder's conspiracy is further evidenced by a letter from the brothers' corporate attorney, Daniel E. Hanley, to Pochowski, dated December 13, 2006:*

*Dear Mr. Pochowski:*

*We are attorneys for Silicon Test Solutions, LLC (STS).*

*When we formed STS on September 8, 2006, we were advised by Romi Mayder that the members would be Romi, Romi's brother Wesley and yourself. . . .*

*On that basis, we prepared the Operating Agreement, which details the ownership interest in STS. . . .*

*Neither Romi or his brother care to act as co-owner with you. On behalf of the Mayders their offer to you to be a member of STS is hereby terminated. . . .*

*Very truly yours,*

*[signature]*

*Daniel E. Hanley*

*(See, Pochowski Decl., ¶ 9 and Ex. D (emphasis added)). This letter makes amply clear that the joint enterprise in which both Romi and Wes Mayder were each involved would proceed even without Pochowski. Likewise, Romi Mayder characterized his brother [REDACTED]"*

**Grounds for Objection:**

Lack of foundation; incompetent evidence; irrelevant and immaterial; letter informing Pochowski that he was not to be included is not evidence of wrongdoing whatsoever.

**VERIGY'S RESPONSE TO THE OBJECTION:**

The objection should be overruled. See Response to Objection #24 above. "A conspiracy must be looked at as a whole, and acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme." *Transgo*, 768 F.2d at 1020-21. The letter in question evidences the fact that an agreement to form an STS enterprise, of whatever legal standing or no legal standing, was made between Romi Mayder and his brother Wes Mayder. Their agreement was their conspiracy and renders Wes Mayder legally responsible for the

wrongful acts of his brother Romi Mayder. *See, Klistoff v. Superior Court*, 157 Cal. App. 4<sup>th</sup> 468, 479 (2007).

**W.MAYDER’S OBJECTION NO. 26:**

Opp. to WM SJ at p. 7, Ins. 3-5 re Wes Mayder’s being a director of STS, Inc.

*“As a director of STS, Inc., Wes Mayder is subject to liability based on his investment in and control of the company if he knew or had reason to know of misappropriation of a competitor’s trade secrets. “A corporate director or officer’s participation in tortious conduct may”*

**Grounds for Objection:**

Lack of foundation; no competent evidence that Wes Mayder was a director of STS, Inc. and all competent evidence refutes this assertion.

**VERIGY’S RESPONSE TO THE OBJECTION:**

The objection should be overruled. There exists competent evidence that Wes Mayder was a director of STS, Inc. *See*, Verigy’s Memorandum of Points & Authorities in Opposition to Wes Mayder’s Motion for Summary Judgment, at 6:17 – 7:2 (citing evidence.) As shown, Romi Mayder repeatedly told Wes Mayder and fellow investor Ben Francois in emails that both were on the STS, Inc. board of directors. Wes Mayder never corrected his brother.

**W.MAYDER’S OBJECTION NO. 27:**

Opp. to WM SJ at p. 7, Ins. 14-28 re Wes Mayder’s being informed of threats by Verigy and being a director of STS, Inc. and allegedly failing to investigate

*“Here, Wes Mayder, as a director of STS, Inc., either knew or reasonably should have known – before the lawsuit was filed in late August 2007 – that STS, Inc. was born of his brother’s duplicity in taking technology from Verigy. In early July 2007, counsel for Verigy sent a pair of letters to Romi Mayder raising effectively the same allegations made in this lawsuit which were immediately forwarded to Wes Mayder (but notably not to other minority shareholders, an action in itself suggesting that Wes Mayder was more than merely a passive investor, but instead his brother’s co-conspirator). (Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo. Tr. at 132:12 – 136:8; 170:2 – 175:6 and Exs. 101 & 104).) Upon receiving these direct allegations of wrongdoing, Wes Mayder failed to take or order appropriate action and admitted at his deposition that he performed no investigation whatsoever into the allegations other than to ask his brother’s opinion of them. (Id.) Wes Mayder further admitted that he accepted “on faith” everything his brother told him, notwithstanding that his brother frequently told him things which were false. (Id., at 175-1-6.) Such “head-in-the-sand” behavior was negligent, objectively unreasonable and precisely the sort of behavior rendering him liable for the misdeeds of the company under the doctrine enunciated in Kadisha. Accordingly, summary judgment absolving”*

//





1 March 29, 2007. Romi Mayder emailed his brother. [REDACTED]  
 2 [REDACTED] (Id., ex. 97). Later the same day, Romi Mayder emailed back  
 3 indicating that [REDACTED]  
 4 [REDACTED] (Id., ex. 98). Romi Mayder then  
 5 emailed and [REDACTED]  
 6 [REDACTED] (Id., ex. 99). Wes Mayder [REDACTED] (Gagliardi Decl., ¶ 2 and  
 7 Ex. A (Wes Mayder Depo.Tr. at 124:3-18.). Yet he was unable to explain why information from a  
 8 merely passive investor would be required for a seller's permit. (Id., at 123:17-19.).<sup>5</sup>"

### 8 **Grounds for Objection:**

9 Irrelevant and immaterial; helping to obtain a seller's permit proves nothing regarding the  
 10 elements of any of Verigy's claims in this action, or of civil conspiracy, a claim not properly pled  
 11 by Verigy in this action.

### 12 **VERIGY'S RESPONSE TO THE OBJECTION:**

13 The objection should be overruled. See Response to Objection #25 above. Wes Mayder's  
 14 lending of his driver's license to secure a seller's permit for an illicit enterprise is an act in  
 15 furtherance of the conspiracy. Further, the request for the driver's license by Romi Mayder is  
 16 evidence suggesting that Wes Mayder's involvement in the enterprise was more than merely as a  
 17 passive investor.

### 18 **W.MAYDER'S OBJECTION NO. 30:**

19 Opp. to WM SJ at p. 9, ln. 14-p. 10, ln. 12 re Wes Mayder dealing with STS, Inc.'s website

20 "Wes Mayder, by his own admission, designed the STS, Inc. website. (Wes Mayder Decl.,  
 21 ¶¶ 14 & 16.). But he denies that either he or his company, WeDirect, ever hosted a website for  
 22 STS, Inc. or his brother. (Id., ¶ 16).

23 Once again, the contemporaneous documentary [REDACTED]  
 24 [REDACTED]  
 25 (Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo.Tr. at 155:19 – 159:12 and ex. 103) (emphasis  
 26 added.) The letter from Verigy alluded to by Romi Mayder was a letter dated July 9, 2007 (the  
 27 previous day) from Verigy's counsel to Romi Mayder, which Romi forwarded to Wes Mayder, in  
 28 which counsel stated: "Your website at [www.silicontest.com](http://www.silicontest.com) shows that you and your STS Entities  
 have been promoting products that appear to incorporate confidential technology you worked on

<sup>5</sup> In fact, in California a driver's license is required for a sellers permit of owners or partners,  
 officers or members of a corporate entity pursuant to the online application materials (See,  
 Gagliardi Decl., ¶ 4 and Ex. C.).

at Verigy.” (*Id.* at 170:2-23 and ex. 104). Wes Mayder testified at his deposition that [REDACTED] (*Id.* at 159:7-12). Not only does Wes Mayder’s conduct [REDACTED] show that he was operating the website (in direct contradiction of his sworn declaration), and show therefore that he was more than a passive investor (again, in direct contradiction of his sworn declaration), it also shows consciousness of guilt. The email Romi Mayder sent to his brother was short on verbiage but deeply pregnant with meaning that could only have been understood by a co-conspirator. The email says, in effect, [REDACTED]. In other words, “they’re on to us.” Wes Mayder willingly complied without asking questions because he knew already that the website contained Verigy trade secret information – and he knew that he, Wes Mayder, had posted it on the website that he designed and hosted. Wes Mayder was clearly a co-conspirator of his brother Romi Mayder. At the very least, a factfinder is entitled to”

### Grounds for Objection:

Irrelevant and immaterial; helping his brother with the STS, Inc. website proves nothing regarding the elements of any of Verigy’s claims in this action, or of civil conspiracy, a claim not properly pled by Verigy in this action.

### VERIGY’S RESPONSE TO THE OBJECTION:

The objection should be overruled. See Response to Objection #25 above. Wes Mayder’s assistance with the STS, Inc. website is an act in furtherance of the conspiracy. Also, it undercuts Wes Mayder’s credibility insofar as he denied active assistance with the website.

### **W.MAYDER’S OBJECTION NO. 31:**

Opp. to WM SJ at p. 10, ln. 14-p. 12, ln. 9 re Romi Mayder’s inventor’s notebook and Wes Mayder’s alleged involvement with such notebook

#### **d. “Wes Mayder Was Involved in the Willful Backdating of Romi Mayder’s Inventor’s NoteBook.**

Wes Mayder also actively conspired with his brother Romi Mayder in the backdating of Romi Mayder’s inventor’s notebook – a false and fraudulent activity in direct furtherance of their conspiracy to steal Verigy’s intellectual property.

Wes Mayder admitted at his deposition receiving an email from his brother Romi Mayder on January 17, 2007 asking Wes Mayder to supply someone to witness entries in Romi Mayder’s inventor’s notebook and stated: [REDACTED]

[REDACTED] (Gagliardi Decl., ¶ 2 and A (Wes Mayder Depo.Tr. at 89:1 – 91:3; 101:8 – 102:20 and ex. 7) (emphasis added).) Wes Mayder replied by email the same day, offering up his employee, Jon Davidson, without questioning the legality or ethics of the task assigned. (*Id.*) [REDACTED] Mayder never took issue with Romi Mayder’s explicit request for assistance in falsifying records; instead, he dutifully complied. (*Id.*)

And, in fact, Romi Mayder’s inventor’s notebook was falsified by Davidson, whose declaration and deposition testimony are at odds with each other and at odds with the contemporaneous emails regarding the subject. The January 17, 2007 email string makes clear that [REDACTED]

1 [REDACTED]. (See, Gagliardi Decl., ¶ 2 and A (Wes Mayder Depo.Tr. at 110:6-18 (conceding this truism).) Yet, Davidson swears under penalty of perjury in his  
2 declaration that the request for him to do so was made a month earlier:

3 *In mid-December 2006, Romi [Mayder] sent an email to Wesley [Mayder] asking*  
4 *about obtaining verification of dates applicable to his lab notebook. Since I had*  
5 *spoken several times with Romi [Mayder] about his work at STS LLC, Wesley*  
6 *knew that I would be a good person for Romi to be referred to. I reviewed Romi's*  
7 *notebook, and based on my recollection of our discussions, I tried to sign with*  
8 *dates corresponding to approximately when we discussed the information.*  
9 *Wesley never directed me to do anything false or anything wrongful, nor would I*  
10 *do so."*

#### 11 **Grounds for Objection:**

12 Irrelevant and immaterial; Wes Mayder's allowing on of his employees, Jon Davidson, to  
13 assist Romi Mayder proves nothing regarding any of Verigy's claims in this action, or of civil  
14 conspiracy, a claim not properly pled by Verigy in this action.

#### 15 **VERIGY'S RESPONSE TO THE OBJECTION:**

16 The objection should be overruled. See Response to Objection #25 above. Wes Mayder's  
17 lending of his employee to falsely backdate entries in an inventor's notebook is an act – and a  
18 fraudulent one – in furtherance of the conspiracy.

#### 19 **D. VERIGY'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION 20 TO WESLEY MAYDER'S MOTION FOR RULE 11 SANCTIONS**

#### 21 **W.MAYDER'S OBJECTION NO. 32:**

22 ("Opp. Rule 11") at p. 1, lns. 9-14 re Wes Mayder's involvement with STS

23 *"This case involves the misappropriation of Verigy's valuable trade secrets and confidential*  
24 *information by Romi Mayder a former Verigy employee, by the new companies he formed, Silicon*  
25 *Test Solutions, LLC ("STS LLC") and Silicon Test Systems Inc. ("STS, Inc.") (collectively, the*  
26 *"STS Entities") and by Romi Mayder's brother and co-conspirator, defendant Wes Mayder, who*  
27 *invested in both STS Entities, was a Member of STS LLC, and a boardmember of STS, Inc."*

#### 28 **Grounds for Objection:**

Irrelevant to the extent Wes Mayder "invested" in the STS entities, as such investment  
does not create liability, and re his being a "member" of STS LLC, as mere membership creates no  
tort liability as has been alleged by Verigy, and re his being a co-conspirator, in that Verigy has  
failed to plead or adduce any of the evidence needed to demonstrate conspiracy; incompetent  
evidence regarding Wes Mayder being a "boardmember" of STS, Inc.

1 **VERIGY'S RESPONSE TO THE OBJECTION:**

2 The objection should be overruled. See Response to Objection #16 above.

3 **W.MAYDER'S OBJECTION NO. 33:**

4 Opp. Rule 11 at p. 1, Ins. 19-21 re Romi Mayder allegedly marketing a product "very  
5 similar to Verigy's products"

6 *"In early July 2007, Verigy learned that Romi Mayder was marketing a product very*  
7 *similar to Verigy's products and began an investigation to determine whether Romi Mayder was*  
8 *using Verigy trade secrets. In late July, a former Agilent officer, Robert Pochowski, informed*  
9 *Verigy of"*

9 **Grounds for Objection:**

10 Lack of foundation; attorney speculation and argument; the Court has already found that  
11 Verigy is *not* marketing a product of the nature of FlashEnhancer; lack of competent testimony to  
12 establish the same.

13 **VERIGY'S RESPONSE TO THE OBJECTION:**

14 The objection should be overruled. See Response to Objection #17 above.

15 **W.MAYDER'S OBJECTION NO. 34:**

16 Opp. Rule 11 at p. 1, Ins. 24-25 re Verigy's investigation having "revealed that Romi  
17 Mayder had misappropriated and was using Verigy's trade secrets"

18 *"On August 22, 2007, after Verigy's investigation revealed that Romi Mayder had*  
19 *misappropriated and was using Verigy's trade secrets, Verigy filed this action and sought a"*

20 **Grounds for Objection:**

21 Lack of foundation; attorney speculation and argument; conclusory with no competent  
22 evidence to support it.

23 **VERIGY'S RESPONSE TO THE OBJECTION:**

24 The objection should be overruled. See Response to Objection #18 above.

25 **W.MAYDER'S OBJECTION NO. 35:**

26 Opp. Rule 11 at p. 2, Ins. 11-5 re Wes Mayder's allegedly being a member of STS LLC  
27 and a director of STS, Inc.

“inquiry and the factual contentions against Wes Mayder have ample evidentiary support. The contemporaneous documentary evidence indicates that Wes Mayder had an operational role in both STS Entities. Wes Mayder was, based on his own signature on the operating agreement, a “member” of STS LLC and Wes Mayder was, based on Romi Mayder’s repeated contemporaneous admissions, a director of STS, Inc. Moreover, regardless of Wes Mayder’s de jure position in the hierarchy of the STS Entities, the documentary evidence indicates that Wes Mayder was a de facto co-conspirator with his brother in expropriating Verigy’s intellectual property for the brothers’ own private profit. Wes Mayder is and was anything but a “passive minority shareholder” as he proclaims himself to be. At the very least, there is now and was when the Complaint was filed, a colorable claim against Wes Mayder as his brother’s co-conspirator precluding the imposition of sanctions pursuant to Rule 11.

## **II. STATEMENT OF ISSUES**

1. Should Verigy and/or its counsel be sanctioned pursuant to Fed.R.Civ.P. 11 for naming Wes Mayder as a defendant in the above-captioned action?  
(Correct answer: No.)
2. Assuming arguendo that Verigy and/or its counsel should be sanctioned pursuant to Fed.R.Civ.P. 11, is an award of attorneys’ fees and costs to Wes Mayder an appropriate form of sanction?  
(Correct answer: No.)
3. Should Wes Mayder and/or his counsel-of-record, jointly and severally, be ordered to reimburse Verigy for its reasonable attorneys’ fees and costs incurred in”

### **Grounds for Objection:**

Lack of foundation; irrelevant and immaterial; being a member of an LLC does not create tort liability even if it were true, which it is not, since, as Verigy has admitted, no operating agreement was ever finalized; no competent evidence of Wes Mayder’s ever being a director of STS, Inc. and the competent evidence directly refutes this assertion.

### **VERIGY’S RESPONSE TO THE OBJECTION:**

The objection should be overruled. See Response to Objections #s 16 and 26 above.

### **W.MAYDER’S OBJECTION NO. 36:**

Opp. Rule 11 at pp. 4-13 re Wes Mayder’s being in a civil conspiracy with Romi Mayder

#### **“A. The Complaint is Not Legally or Factually “Baseless” From an Objective Perspective.**

##### **I. Wes Mayder Was a Co-Conspirator of Romi Mayder.**

As discussed in the opposition to Wes Mayder’s contemporaneously filed summary judgment motion, Wes Mayder was a co-conspirator in his brother Romi Mayder’s activities. At the very least, there are genuinely disputed material issues of fact concerning Wes Mayder’s involvement with his brother’s theft of Verigy’s intellectual property. As such, Verigy’s Complaint as against Wes Mayder cannot be considered legally or factually baseless from an objective perspective.

“A civil conspiracy occurs when the parties have reached ‘a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.’” *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1020 (9<sup>th</sup> Cir. 1985), quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 809-810 (1946). “A conspiracy must be looked at as



1 a whole, and acts which are in themselves legal lose that character when they become constituent  
elements of an unlawful scheme.” *Transgo*, 768 F.2d at 1020-21.

2 “The existence of a civil conspiracy makes each participant in the wrongful act  
3 responsible as a joint tortfeasor for all damages resulting from the wrong, whether or not a  
4 participant was a direct actor and regardless of the degree of his activity.” *Klistoff v. Superior*  
5 *Court*, 157 Cal. App. 4<sup>th</sup> 469, 479 (2007) (emphasis added). “By participation in a civil  
6 conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators  
7 within the ambit of the conspiracy.” *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7  
8 Cal.4<sup>th</sup> 503, 510-11 (1994).

9 Here, as shown below, Wes Mayder was an active co-conspirator in his brother’s  
10 activities, regardless of his formal position in the STS Entities.

11 And, as his brother’s co-conspirator, Wes Mayder is equally liable for Romi Mayder’s  
12 misconduct. See, *Transgo*, 768 F.2d at 1023 (As co-conspirators, the defendants were found to be  
13 joint tortfeasors, jointly and severally liable for all compensatory damages awarded . . .); *Klistoff*,  
14 157 Cal. App. 4<sup>th</sup> at 479. At the very least, there are genuinely disputed material issues of fact  
15 whether Wes Mayder conspired with his brother’s misuse of Verigy’s intellectual property.

16 **a. Wes Mayder Agreed to Become a Member of STS, LLC.**

17 Wes Mayder contends in his Rule 11 motion that “[h]e is not involved in his brother’s  
18 business, has no background at all in the semiconductor industry . . . has no ownership interest in  
19 defendant STS LLC, nor has he ever . . . had an ownership interest therein.” (Motion, at pp. 2-3)  
20 (emphasis added). These assertions are not supported by Wes Mayder’s sworn declaration (which  
21 is highly misleading and which Wes Mayder, in material respects, disavowed at his deposition.)  
22 Further, the assertions are belied by documentary evidence proving that, in fact, Wes Mayder was  
23 involved with his brother in the semiconductor industry and did have an ownership interest in his  
24 brother’s business.

25 Wes Mayder, along with his brother Romi Mayder, signed the operating agreement in STS  
26 LLC, made as of October 11, 2006, which designates Wes Mayder as a “Member” of the LLC,  
27 with a 20 percent ownership stake in such limited liability company based on a \$250,000 capital  
28 contribution. (See, *Pochowski Decl.*, ¶ 6 and Ex. A; see also, *Gagliardi Decl.*, ¶ 2 and Ex. A (Wes  
Mayder Depo.Tr., at 46:12 – 47:23; 50:1-10; 51:18 – 52:2; 211:11 – 214:3 and Ex. 91) (copy of  
STS LLC Operating Agreement signed by Wes Mayder)). Although the Operating Agreement was  
never signed by Pochowski, the document is nevertheless admissible evidence that the Mayder  
brothers, each of whom did sign it, were engaged in a joint enterprise involving semiconductor  
device testing, STS LLC. On its face, the document evinces “the intent of each Member . . . to  
actively engage in the management” of the enterprise’s business, “Semiconductor Device  
Testing.” (*Pochowski Decl.*, Ex. A, ¶ 4.1; Wes Mayder Depo.Tr., Ex. 91, ¶ 4.1) (emphasis added).

As mentioned, Wes Mayder affixed his signature to this document. “The existence  
of an LLC begins upon the filing of articles of incorporation by the Secretary of State. . . To  
validly complete the formation of an LLC, the members must enter into an operating agreement  
either before or after filing the articles. But the operating agreement need not be in writing;  
indeed it may consist of no more than an oral agreement among the initial members to organize  
the limited liability company!” 1 Friedman, *California Practice Guide: Corporations*, ¶¶ 2:36:30  
& 2:36:32 (2007), at p.2-17, citing Cal. Corps. Code §§ 17001(b) & 17050(a) (emphasis added).  
Here, by signing the written operating agreement both Romi Mayder and Wes Mayder evinced  
their intent to, and did, complete the formation the STS LLC, of which they were both members.

Moreover, even if arguendo the STS LLC entity was never legally consummated in the  
absence of Pochowski’s signature on the Operating Agreement, nonetheless, Wes Mayder’s

6 Confronted at his deposition with his signature on the STS LLC Operating Agreement,  
Wes Mayder testified he did not recall signing it but admitted that the signature looked “similar”  
to his own, and he could not deny that it was, in fact, his. (*Gagliardi Decl.*, ¶ 2 and Ex. A (Wes  
Mayder Depo.Tr. at 46:12 – 47:23; 50:1-10; 51:18 – 52:2; 211:11 – 214:3 and Ex. 91). Wes  
Mayder also testified that he was retracting parts of sworn declaration in which he denied signing  
the STS LLC Operating Agreement. (*Id.*, at 52:12 – 54:11).



signature on the document evidences factually the brothers' conspiracy to operate a company engaged in the semiconductor device testing industry – using Verigy's technology. Wes Mayder's signature on the Operating Agreement is written contemporaneous evidence of his agreement to join his brother Romi Mayder's illicit enterprise. It is evidence of Wes Mayder's participation in an unlawful conspiracy and thereby exposes him to joint and several liability for Romi Mayder's actions in furtherance of the conspiracy. This is true whether or not Wes Mayder was a direct actor and regardless of the degree of his activity (or whether he knew anything about the semiconductor device testing industry). *Klistoff*, 157 Cal. App. 4<sup>th</sup> at 479.

Wes Mayder's conspiracy is further evidenced by a letter from the brothers' attorney, Daniel E. Hanley, to Pochowski, dated December 13, 2006:

Dear Mr. Pochowski:

We are attorneys for Silicon Test Solutions, LLC (STS).

When we formed STS on September 8, 2006, we were advised by Romi Mayder that the members would be Romi, Romi's brother Wesley and yourself. . . .

On that basis, we prepared the Operating Agreement, which details the ownership interest in STS. . . .

Neither Romi or his brother care to act as co-owner with you. On behalf of the Mayders their offer to you to be a member of STS is hereby terminated. . . .

Very truly yours,

[signature]

Daniel E. Hanley

(See, *Pochowski Decl.*, ¶ 9 and Ex. D (emphasis added)). This letter makes amply clear that the joint enterprise in which both Romi and Wes Mayder were each involved would proceed even without Pochowski. Likewise, Romi Mayder characterized his brother [REDACTED] (Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo.Tr. at 40:20 – 41:13; 42:18 – 43:21 and Ex. 90)). Further, Wes Mayder admitted at deposition that he made a \$250,000 capital contribution to STS LLC to secure his ownership stake in STS LLC. (*Id.*, at 31:14 – 38:21; 83:20 – 86:7 and Ex. 94)).

Any contention that Wes Mayder never held an ownership stake in STS LLC is simply and demonstrably false. At the very least, the evidence raises a genuine dispute of material fact as to Wes Mayder's involvement in the management of STS LLC and whether he agreed to join in a conspiracy with his brother to illegally profit from the use of Verigy's technology.

**b. Wes Mayder Was at Relevant Times a Director of STS, Inc.**

Wes Mayder also contends that he has “no board position, no officership, no employee standing, and no operating role whatsoever” in STS, Inc. (Motion, at p.3, citing, *Wes Mayder Decl.*, ¶¶ 12-13). However, these contentions are also contradicted by documentary evidence produced by defendants in this action.

In an email string on July 3, 2007, which Wes Mayder authenticated at his deposition, [REDACTED] (Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo.Tr. at 124:20 – 127:8 and Ex. 100.)) Wes Mayder was copied on the email. (*Id.*) Similarly, in an email string on July 9, 2007, Romi Mayder wrote to Wes Mayder and Francois, stating: [REDACTED]

[REDACTED] (*Id.*, Wes Mayder Depo.Tr. at 142:2 – 143:23 and Ex. 102) (emphasis added).)

1 *Wes Mayder received the email string and responded to it. (Id.)*<sup>7</sup> Accordingly, there are at least  
2 genuinely disputed issues of material fact whether Wes Mayder was or is a member of the board of  
3 directors of STS, Inc.

4 As a director of STS, Inc., Wes Mayder is subject to liability based on his investment in and  
5 control of the company if he knew or had reason to know of misappropriation of a competitor's  
6 trade secrets. "A corporate director or officer's participation in tortious conduct may be shown  
7 not solely by direct action but also by knowing consent to or approval of unlawful acts." *PMC,*  
8 *Inc. v. Kadisha*, 78 Cal. App. 4<sup>th</sup> 1368, 1380 (2000). "To maintain a tort claim against a director  
9 in his or her personal capacity, a plaintiff must first show that the director specifically authorized,  
10 directed or participated in the allegedly tortious conduct (citation); or that although they  
11 specifically knew or reasonably should have known that some hazardous condition or activity  
12 under their control could injure plaintiff, they negligently failed to take or order appropriate  
13 action to avoid the harm (citations)." *Id.*, quoting, *Frances T. v. Village Green Owners Assn.*, 42  
14 Cal.3d 490, 508-09 (1986) (emphasis by Kadisha court).

15 Here, Wes Mayder, as a director of STS, Inc., either knew or reasonably should have  
16 known – before the lawsuit was filed in late August 2007 – that STS, Inc. was born of his brother's  
17 duplicity in taking technology from Verigy. In early July 2007, counsel for Verigy sent a pair of  
18 letters to Romi Mayder raising effectively the same allegations made in this lawsuit which were  
19 immediately forwarded to Wes Mayder (but notably not to other minority shareholders, an action  
20 in itself suggesting that Wes Mayder was more than merely a passive investor, but instead his  
21 brother's co-conspirator). (Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo. Tr. at 132:12 –  
22 136:8; 170:2 – 175:6 and Exs. 101 & 104).) Upon receiving these direct allegations of  
23 wrongdoing, Wes Mayder failed to take or order appropriate action and admitted at his deposition  
24 that he performed no investigation whatsoever into the allegations other than to ask his brother's  
25 opinion of them. (*Id.*) Wes Mayder further admitted that he accepted "on faith" everything his  
26 brother told him, notwithstanding that his brother frequently told him things which were false.  
27 (*Id.*, at 175:1-6.) Such "head-in-the-sand" behavior was negligent, objectively unreasonable and  
28 precisely the sort of behavior rendering him liable for the misdeeds of the company under the  
doctrine enunciated in *Kadisha*. Accordingly, there is an objective basis for the claims against  
him.

**c. Wes Mayder Was an Active Co-Conspirator with Romi Mayder.**

Wes Mayder argues repeatedly that he was "solely a passive, minority shareholder" in  
Romi Mayder's company, STS, Inc. (Motion, at p.1; see also *id.*, at pp.2, 8, 9, 10 & 11; Wes  
Mayder Decl., ¶ 7 ("I am only a passive shareholder").) However, this assertion is nonsense,  
belied by Wes Mayder's own admissions about his active role in the operations of company (and  
its predecessor STS LLC), whether or not he was formally a member of STS, Inc.'s board of  
directors.

**(i) Wes Mayder Solicited Investors for STS, Inc.**

Wes Mayder, based on his own deposition testimony, was actively involved in the effort to  
secure investors for STS, Inc. [REDACTED] (Gagliardi  
Decl., ¶ 2 and Ex. A (Wes Mayder Depo. Tr. at 56:11 – 59:10 and Ex. 92).)  
[REDACTED] (*Id.*, at 65:11 – 70:12 and Ex. 93)  
[REDACTED] )

[REDACTED] (Gagliardi Decl., ¶¶ 2-3 and

<sup>7</sup> Defendants also deny that Francois was ever a member of STS, Inc.'s board of directors,  
but Romi Mayder told him otherwise. (Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo. Tr. at  
124:20 – 127:8; 142:2 – 143:23 and Exs. 100 & 102).) Further, it would appear Francois believed  
him, because, as of July 8, 2008, Francois was touting himself on the internet as a "founding  
Director of Silicon Test Systems in San Jose, CA." (*Id.*, Ex. 110).

Ex. A (Wes Mayder Depo.Tr. at 59:11 – 60:2) and Ex. B (Davidson Depo.Tr. at 70:4 – 71:8).  
Fund-raising for a start-up company is not the domain of a merely passive investor.

(ii) **Wes Mayder Used His Driver's License for a Seller's Permit for STS, Inc.**

Wes Mayder, by his own admission at deposition, was also actively involved in [REDACTED]  
[REDACTED]  
(Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo.Tr. at 118:11 – 124:18 and Exs. 97-99).) On March 29, 2007, Romi Mayder emailed his brother, [REDACTED]  
[REDACTED] (Id., Ex. 97). Later the same day, Romi Mayder emailed back indicating that [REDACTED]  
[REDACTED] (Id., Ex. 98). Romi Mayder then emailed and [REDACTED]  
[REDACTED] (Id., Ex. 99). Wes Mayder [REDACTED] (Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo.Tr. at 124:3-18.). Yet, he was unable to explain why information from a merely passive investor would be required for a seller's permit. (Id., at 123:17-19.)<sup>8</sup>

(iii) **Wes Mayder Operated the STS, Inc. Website.**

Wes Mayder, by his own admission, designed the STS, Inc. website. (Wes Mayder Decl., ¶¶ 14 & 16.). But he denies that either he or his company, WeDirect, ever hosted a website for STS, Inc. or his brother. (Id., ¶ 16).

Once again, the contemporaneous documentary [REDACTED]  
[REDACTED]  
(Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo.Tr. at 155:19 – 159:12 and Ex. 103) (emphasis added.) The letter from Verigy alluded to by Romi Mayder was a letter dated July 9, 2007 (the previous day) from Verigy's counsel to Romi Mayder, which Romi forwarded to Wes Mayder, in which counsel stated: "Your website at [www.silicontest.com](http://www.silicontest.com) shows that you and your STS Entities have been promoting products that appear to incorporate confidential technology you worked on at Verigy." (Id., at 170:2-23 and Ex. 104). Wes Mayder testified at his deposition that [REDACTED] (Id., at 159:7-12).

Not only does Wes Mayder's conduct [REDACTED] show that he was operating the website (in direct contradiction of his sworn declaration), and show therefore that he was more than a passive investor (again, in direct contradiction of his sworn declaration), it also shows consciousness of guilt. The email Romi Mayder sent to his brother was short on verbiage but deeply pregnant with meaning that could only have been understood by a co-conspirator. The email says, in effect, [REDACTED]  
[REDACTED] In other words, "they're on to us." Wes Mayder willingly complied without asking questions because he knew already that the website contained Verigy trade secret information – and he knew that he, Wes Mayder, had posted it on the website that he designed and hosted. Wes Mayder was clearly a co-conspirator of his brother Romi Mayder. At the very least, an objective basis exists such that a factfinder is entitled to make that determination based on the evidence at trial.

<sup>8</sup> In fact, in California a driver's license is required for a sellers permit of owners or partners, officers or members of a corporate entity pursuant to the online application materials (See, Gagliardi Decl., ¶ 4 and Ex. C.).

(iv) **Wes Mayder Was Involved in the Willful Backdating of Romi Mayder's Inventor's Notebook.**

Wes Mayder also actively conspired with his brother Romi Mayder in the backdating of Romi Mayder's inventor's notebook – a false and fraudulent activity in direct furtherance of their conspiracy to steal Verigy's intellectual property.

Wes Mayder admitted at his deposition receiving an email from his brother Romi Mayder on January 17, 2007 asking Wes Mayder to supply someone to witness entries in Romi Mayder's inventor's notebook and stated:

(Gagliardi Decl., ¶ 2 and A (Wes Mayder Depo.Tr. at 89:1 – 91:3; 101:8 – 102:20 and Ex. 7) (emphasis added).) Wes Mayder replied by email the same day, offering up his employee, Jon Davidson, without questioning the legality or ethics of the task assigned. (Id.)

Mayder never took issue with Romi Mayder's explicit request for assistance in falsifying records; instead, he dutifully complied. (Id.)

And, in fact, Romi Mayder's inventor's notebook was falsified by Davidson, whose declaration and deposition testimony are at odds with each other and at odds with the contemporaneous emails regarding the subject. The January 17, 2007 email string makes clear that

(See, Gagliardi Decl., ¶ 2 and A (Wes Mayder Depo.Tr. at 110:6-18 (conceding this truism).) Yet, Davidson swears under penalty of perjury in his declaration that the request for him to do so was made a month earlier:

In mid-December 2006, Romi [Mayder] sent an email to Wesley [Mayder] asking about obtaining verification of dates applicable to his lab notebook. Since I had spoken several times with Romi [Mayder] about his work at STS LLC, Wesley knew that I would be a good person for Romi to be referred to. I reviewed Romi's notebook, and based on my recollection of our discussions, I tried to sign with dates corresponding to approximately when we discussed the information. Wesley never directed me to do anything false or anything wrongful, nor would I do so.

(Davidson Decl., ¶ 7) (emphasis added). Thus, Davidson admits to backdating Romi Mayder's inventor's notebook but vainly denies that it amounts to anything "false" or "wrongful."

However, in contradiction of Davidson's own declaration, Davidson swears under oath in his deposition testimony

(Gagliardi Decl., ¶ 3 and Ex. B (Davidson Depo.Tr. at 34:24 – 35:14; 44:10 – 45:19).) In other words, Davidson

(Id., at 85:1 – 90:17 and Ex. 6) (copy of the notebook).) Davidson's deposition testimony and declaration simply cannot be harmonized – one or both must be untrue on the subject of backdating the notebook, and indeed both are. Neither Davidson's declaration nor his deposition testimony is consistent with the definitive, contemporaneous documentary evidence that the original request for Davidson to witness and endorse the notebook was not made until January 17, 2007 and therefore Davidson simply could not have done so beforehand.<sup>9</sup> Thus, Davidson (whose only connection to Romi Mayder is that he is Wes Mayder's employee offered up by Wes Mayder for the job of falsifying records) is utterly discredited as a witness.

Although it is unknown just when Davidson signed Romi Mayder's notebook, what is known is that it had to be after January 17, 2007 (rendering Davidson's declaration and

<sup>9</sup> [REDACTED]



deposition testimony utterly impossible), that it involved falsifying records, and that Wes Mayder was inextricably involved in this scheme

The evidence is thus overwhelming that Wes Mayder is thoroughly entangled with Romi Mayder's misdeeds involving the theft of Verigy's technology. Plainly, Wes Mayder was an integral part of the conspiracy with his brother Romi Mayder to tamper with evidence of the real ownership of STS, Inc's purported intellectual property. Wes Mayder's assertion that he would never do anything false or fraudulent is completely incredible in light of this evidence. Certainly, at the very least, there is a colorable claim against Wes Mayder, precluding Rule 11 sanctions.

**2. Counsel for Verigy Conducted a Reasonable and Competent Inquiry Into the Claims Against Wes Mayder Before Filing the Complaint.**

As mentioned, to impose sanctions where the complaint is the primary focus of a Rule 11 motion, a district court in the Ninth Circuit must find not only that the complaint is objectively baseless, but also that the attorney failed to conduct a reasonable and competent inquiry before signing and filing it. *Christian*, 286 F.3d at 1127.

Wes Mayder has utterly failed to carry his burden in establishing this second prong. He has not even purported to offer any admissible facts related to the quality of the pre-suit attorney"

**Grounds for Objection:**

Lack of foundation, irrelevant. Verigy has failed to plead any facts in its Complaint that would be required for it to be able to proceed on a civil conspiracy basis, as set forth in CACI 3600.

**VERIGY'S RESPONSE TO THE OBJECTION:**

The objection should be overruled. See Response to Objection # 21 above.

**W.MAYDER'S OBJECTION NO. 37:**

Opp. Rule 11 at p. 5, LNS. 2-P. 6, LN. 17 RE Wes Mayder's signing the draft operating agreement for STS LLC

"Wes Mayder contends in his Rule 11 motion that "[h]e is not involved in his brother's business, has no background at all in the semiconductor industry . . . has no ownership interest in defendant STS LLC, nor has he ever . . . had an ownership interest therein." (Motion, at pp. 2-3) (emphasis added). These assertions are not supported by Wes Mayder's sworn declaration (which is highly misleading and which Wes Mayder, in material respects, disavowed at his deposition.) Further, the assertions are belied by documentary evidence proving that, in fact, Wes Mayder was involved with his brother in the semiconductor industry and did have an ownership interest in his brother's business.

Wes Mayder, along with his brother Romi Mayder, signed the operating agreement in STS LLC, made as of October 11, 2006, which designates Wes Mayder as a "Member" of the LLC, with a 20 percent ownership stake in such limited liability company based on a \$250,000 capital contribution. (See, *Pochowski Decl.*, ¶ 6 and Ex. A; see also, *Gagliardi Decl.*, ¶ 2 and Ex. A (Wes Mayder Depo.Tr., at 46:12 – 47:23; 50:1-10; 51:18 – 52:2; 211:11 – 214:3 and Ex. 91) (copy of STS LLC Operating Agreement signed by Wes Mayder)). Although the Operating Agreement was never signed by Pochowski, the document is nevertheless admissible evidence that the Mayder brothers, each of whom did sign it, were engaged in a joint enterprise involving semiconductor device testing, STS LLC. On its face, the document evinces "the intent of each Member . . . to



1 actively engage in the management” of the enterprise’s business, “Semiconductor Device  
Testing.” (Pochowski Decl., Ex. A, ¶ 4.1; Wes Mayder Depo.Tr., Ex. 91, ¶ 4.1) (emphasis added).

2 As mentioned, Wes Mayder affixed his signature to this document.<sup>10</sup> “The existence  
3 of an LLC begins upon the filing of articles of incorporation by the Secretary of State. . . To  
4 validly complete the formation of an LLC, the members must enter into an operating agreement  
either before or after filing the articles. But the operating agreement need not be in writing;  
indeed it may consist of no more than an oral agreement among the initial members to organize  
the limited liability company!” 1 Friedman, California Practice Guide: Corporations, ¶¶ 2:36:30  
5 & 2:36:32 (2007), at p.2-17, citing Cal. Corps. Code §§ 17001(b) & 17050(a) (emphasis added).  
Here, by signing the written operating agreement both Romi Mayder and Wes Mayder evinced  
6 their intent to, and did, complete the formation the STS LLC, of which they were both members.

7 Moreover, even if arguendo the STS LLC entity was never legally consummated in the  
absence of Pochowski’s signature on the Operating Agreement, nonetheless, Wes Mayder’s  
signature on the document evidences factually the brothers’ conspiracy to operate a company  
8 engaged in the semiconductor device testing industry – using Verigy’s technology. Wes Mayder’s  
signature on the Operating Agreement is written contemporaneous evidence of his agreement to  
9 join his brother Romi Mayder’s illicit enterprise. It is evidence of Wes Mayder’s participation in  
an unlawful conspiracy and thereby exposes him to joint and several liability for Romi Mayder’s  
10 actions in furtherance of the conspiracy. This is true whether or not Wes Mayder was a direct  
actor and regardless of the degree of his activity (or whether he knew anything about the  
semiconductor device testing industry). Klistoff, 157 Cal. App. 4<sup>th</sup> at 479.”

## 12 **Grounds for Objection:**

13 Lack of foundation, incompetent evidence; irrelevant and immaterial. Mere signatures on  
14 an operating agreement constitute no evidence of a conspiracy, and there is no evidence of  
15 knowledge by Wes Mayder to use any Verigy technology. Being willing to join an LLC does not  
16 evidence anything about a conspiracy or any tortuous conduct.

## 17 **VERIGY’S RESPONSE TO THE OBJECTION:**

18 The objection should be overruled. See Response to Objections #s 16 and 26 above.

## 19 **W.MAYDER’S OBJECTION NO. 38:**

20 Opp. Rule 11 at p. 6, ln. 18- p. 7, ln. 9 re letter from attorney for Romi Mayder constituting  
21 evidence of civil conspiracy

22 “Wes Mayder’s conspiracy is further evidenced by a letter from the brothers’ attorney,  
23 Daniel E. Hanley, to Pochowski, dated December 13, 2006:

24 Dear Mr. Pochowski:

25 <sup>10</sup> Confronted at his deposition with his signature on the STS LLC Operating Agreement,  
26 Wes Mayder testified he did not recall signing it but admitted that the signature looked “similar”  
to his own, and he could not deny that it was, in fact, his. (Gagliardi Decl., ¶ 2 and Ex. A (Wes  
27 Mayder Depo.Tr. at 46:12 – 47:23; 50:1-10; 51:18 – 52:2; 211:11 – 214:3 and Ex. 91). Wes  
Mayder also testified that he was *retracting* parts of sworn declaration in which he denied signing  
28 the STS LLC Operating Agreement. (*Id.*, at 52:12 – 54:11).

1        *We are attorneys for Silicon Test Solutions, LLC (STS).*

2        *When we formed STS on September 8, 2006, we were advised by Romi Mayder*  
 3        *that the members would be Romi, Romi's brother Wesley and yourself. . . .*

4        *On that basis, we prepared the Operating Agreement, which details the ownership*  
 5        *interest in STS. . . .*

6        *Neither Romi or his brother care to act as co-owner with you. On behalf of the*  
 7        *Mayders their offer to you to be a member of STS is hereby terminated. . . .*

8        *Very truly yours,*

9        *[signature]*

10       *Daniel E. Hanley*

11       *(See, Pochowski Decl., ¶ 9 and Ex. D (emphasis added)). This letter makes amply clear that the*  
 12       *joint enterprise in which both Romi and Wes Mayder were each involved would proceed even*  
 13       *without Pochowski. Likewise, Romi Mayder characterized his brother [REDACTED]*  
 14       *[REDACTED] (Gagliardi Decl., ¶ 2*  
 15       *and Ex. A (Wes Mayder Depo.Tr. at 40:20 – 41:13; 42:18 – 43:21 and Ex. 90)). Further, Wes*  
 16       *Mayder admitted at deposition that he made a \$250,000 capital contribution to STS LLC to secure*  
 17       *his ownership stake in STS LLC. (Id., at 31:14 – 38:21; 83:20 – 86:7 and Ex. 94)).”*

18       **Grounds for Objection:**

19       Lack of foundation; incompetent evidence; irrelevant and immaterial; letter informing  
 20       Pochowski that he was not to be included is not evidence of any wrongdoing whatsoever.

21       **VERIGY'S RESPONSE TO THE OBJECTION:**

22       The objection should be overruled. See Response to Objection # 25 above.

23       **W.MAYDER'S OBJECTION NO. 39:**

24       Opp. Rule 11 at p. 7, ln. 14-p.9, ln. 6 re Wes Mayder's allegedly being a director of STS,  
 25       Inc., being informed of threats by Verigy and being a director of STS, Inc. and allegedly failing to  
 26       investigate

27       **“b.       Wes Mayder Was at Relevant Times a Director of STS, Inc.**

28       *Wes Mayder also contends that he has “no board position, no officership, no employee*  
 29       *standing, and no operating role whatsoever” in STS, Inc. (Motion, at p.3, citing, Wes Mayder*  
 30       *Decl., ¶¶ 12-13). However, these contentions are also contradicted by documentary evidence*  
 31       *produced by defendants in this action.*

32       *In an email string on July 3, 2007, which Wes Mayder authenticated at his deposition,*  
 33       *[REDACTED]*  
 34       *(Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo.Tr. at 124:20*  
 35       *– 127:8 and Ex. 100.)) Wes Mayder was copied on the email. (Id.) Similarly, in an email string*  
 36       *on July 9, 2007, Romi Mayder wrote to Wes Mayder and Francois, stating: [REDACTED]*  
 37       *[REDACTED]*

1 [REDACTED] (*Id.*, *Wes Mayder Depo.Tr.* at 142:2 – 143:23 and *Ex. 102*) (*emphasis added*.)  
 2 *Wes Mayder received the email string and responded to it. (Id.)*<sup>11</sup> Accordingly, there are at least  
 3 genuinely disputed issues of material fact whether Wes Mayder was or is a member of the board of  
 4 directors of STS, Inc.

5 As a director of STS, Inc., Wes Mayder is subject to liability based on his investment in and  
 6 control of the company if he knew or had reason to know of misappropriation of a competitor's  
 7 trade secrets. "A corporate director or officer's participation in tortious conduct may be shown  
 8 not solely by direct action but also by knowing consent to or approval of unlawful acts." *PMC,*  
*Inc. v. Kadisha*, 78 Cal. App. 4<sup>th</sup> 1368, 1380 (2000). "To maintain a tort claim against a director  
 9 in his or her personal capacity, a plaintiff must first show that the director specifically authorized,  
 10 directed or participated in the allegedly tortious conduct (citation); or that although they  
 11 specifically knew or reasonably should have known that some hazardous condition or activity  
 12 under their control could injure plaintiff, they negligently failed to take or order appropriate  
 13 action to avoid the harm (citations)." *Id.*, quoting, *Frances T. v. Village Green Owners Assn.*, 42  
 14 Cal.3d 490, 508-09 (1986) (*emphasis by Kadisha court*).

15 Here, Wes Mayder, as a director of STS, Inc., either knew or reasonably should have  
 16 known – before the lawsuit was filed in late August 2007 – that STS, Inc. was born of his brother's  
 17 duplicity in taking technology from Verigy. In early July 2007, counsel for Verigy sent a pair of  
 18 letters to Romi Mayder raising effectively the same allegations made in this lawsuit which were  
 19 immediately forwarded to Wes Mayder (but notably not to other minority shareholders, an action  
 20 in itself suggesting that Wes Mayder was more than merely a passive investor, but instead his  
 21 brother's co-conspirator). (*Gagliardi Decl.*, ¶ 2 and *Ex. A (Wes Mayder Depo. Tr.* at 132:12 –  
 22 136:8; 170:2 – 175:6 and *Exs. 101 & 104*.) Upon receiving these direct allegations of  
 23 wrongdoing, Wes Mayder failed to take or order appropriate action and admitted at his deposition  
 24 that he performed no investigation whatsoever into the allegations other than to ask his brother's  
 25 opinion of them. (*Id.*) Wes Mayder further admitted that he accepted "on faith" everything his  
 26 brother told him, notwithstanding that his brother frequently told him things which were false.  
 27 (*Id.*, at 175:1-6.) Such "head-in-the-sand" behavior was negligent, objectively unreasonable and  
 28 precisely the sort of behavior rendering him liable for the misdeeds of the company under the  
 doctrine enunciated in *Kadisha*. Accordingly, there is an objective basis for the claims against  
 him."

## 18 **Grounds for Objection:**

19 Lack of foundation; no competent evidence that Wes Mayder was a director of STS, Inc.  
 20 and all competent evidence refutes this assertion; irrelevant and immaterial; as a non-director or  
 21 officer, Wes Mayder had no obligation to investigate, and despite that lack of obligation, he did  
 22 investigate to the best of his ability.

## 23 **VERIGY'S RESPONSE TO THE OBJECTION:**

24 The objection should be overruled. See Response to Objection #26 above.

26 <sup>11</sup> Defendants also deny that Francois was ever a member of STS, Inc.'s board of directors,  
 27 but Romi Mayder told him otherwise. (*Gagliardi Decl.*, ¶ 2 and *Ex. A (Wes Mayder Depo.Tr.* at  
 28 124:20 – 127:8; 142:2 – 143:23 and *Exs. 100 & 102*.) Further, it would appear Francois believed  
 him, because, as of July 8, 2008, Francois was touting himself on the internet as a "founding  
 Director of Silicon Test Systems in San Jose, CA." (*Id.*, *Ex. 110*).

**W.MAYDER'S OBJECTION NO. 40:**

Opp. Rule 11 at p. 9, Ins. 14-26 re Wes Mayder allegedly helping to solicit investments in STS, Inc.

(i) ***“Wes Mayder Solicited Investors for STS, Inc.***  
*Wes Mayder, based on his own deposition testimony, was actively involved in the effort to secure investors for STS, Inc. (Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo.Tr. at 56:11 – 59:10 and Ex. 92).) (Id., at 65:11 – 70:12 and Ex. 93).)*  
*(Gagliardi Decl., ¶¶ 2-3 and Ex. A (Wes Mayder Depo.Tr. at 59:11 – 60:2) and Ex. B (Davidson Depo.Tr. at 70:4 – 71:8).) Fund-raising for a start-up company is not the domain of a merely passive investor.”*

**Grounds for Objection:**

Irrelevant and immaterial; helping to raise money proves nothing regarding the elements of any of Verigy's claims in this action, or of civil conspiracy, a claim not properly pled by Verigy in this action.

**VERIGY'S RESPONSE TO THE OBJECTION:**

The objection should be overruled. See Response to Objection #28 above.

**W.MAYDER'S OBJECTION NO. 41:**

Opp. Rule 11 at p. 9, ln. 27-p. 10, ln. 16 re Wes Mayder using his driver's license to obtain a seller's permit for STS, Inc.

(ii) ***“Wes Mayder Used His Driver's License for a Seller's Permit for STS, Inc.***  
*Wes Mayder, by his own admission at deposition, was also actively involved in (Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo.Tr. at 118:11 – 124:18 and Exs. 97-99).) On March 29, 2007, Romi Mayder emailed his brother, (Id., Ex. 97). Later the same day, Romi Mayder emailed back indicating that (Id., Ex. 98). Romi Mayder then emailed and (Id., Ex. 99). Wes Mayder (Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo.Tr. at 124:3-18.). Yet, he was unable to explain why information from a*

1 *merely passive investor would be required for a seller's permit. (Id., at 123:17-19.)*<sup>12</sup>

2 **Grounds for Objection:**

3 Irrelevant and immaterial; helping to obtain a seller's permit proves nothing regarding the  
4 elements of any of Verigy's claims in this action, or of civil conspiracy, a claim not properly pled  
5 by Verigy in this action.

6 **VERIGY'S RESPONSE TO THE OBJECTION:**

7 The objection should be overruled. See Response to Objection #29 above.

8 **W.MAYDER'S OBJECTION NO. 42:**

9 Opp. Rule 11 at p. 10, ln. 17-p. 11, ln. 17 re Wes Mayder dealing with STS, Inc.'s website

10 (iii) ***"Wes Mayder Operated the STS, Inc. Website.***

11 *Wes Mayder, by his own admission, designed the STS, Inc. website. (Wes Mayder Decl.,*  
12 *¶¶ 14 & 16.). But he denies that either he or his company, WeDirect, ever hosted a website for*  
13 *STS, Inc. or his brother. (Id., ¶ 16).*

14 *Once again, the contemporaneous documentary*

15 *(Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo.Tr. at 155:19 – 159:12 and Ex. 103)*  
16 *(emphasis added.) The letter from Verigy alluded to by Romi Mayder was a letter dated July 9,*  
17 *2007 (the previous day) from Verigy's counsel to Romi Mayder, which Romi forwarded to Wes*  
18 *Mayder, in which counsel stated: "Your website at [www.silicontest.com](http://www.silicontest.com) shows that you and your*  
19 *STS Entities have been promoting products that appear to incorporate confidential technology you*  
20 *worked on at Verigy." (Id., at 170:2-23 and Ex. 104). Wes Mayder testified at his deposition that*  
21 *(Id., at 159:7-12).*

22 *Not only does Wes Mayder's conduct*  
23 *he was operating the website (in direct contradiction of his sworn declaration), and show*  
24 *therefore that he was more than a passive investor (again, in direct contradiction of his sworn*  
25 *declaration), it also shows consciousness of guilt. The email Romi Mayder sent to his brother was*  
26 *short on verbiage but deeply pregnant with meaning that could only have been understood by a*  
27 *co-conspirator. The email says, in effect,*  
28 *In other words, "they're on to us." Wes Mayder willingly complied without asking*  
*questions because he knew already that the website contained Verigy trade secret information –*  
*and he knew that he, Wes Mayder, had posted it on the website that he designed and hosted. Wes*  
*Mayder was clearly a co-conspirator of his brother Romi Mayder. At the very least, an objective*  
*basis exists such that a factfinder is entitled to make that determination based on the evidence at*  
*trial."*

25 **Grounds for Objection:**

27 <sup>12</sup> In fact, in California a driver's license is required for a sellers permit of owners or partners,  
28 officers or members of a corporate entity pursuant to the online application materials (See,  
Gagliardi Decl., ¶ 4 and Ex. C.).



Irrelevant and immaterial; helping his brother with the STS, Inc. website proves nothing regarding the elements of any of Verigy's claims in this action, or of civil conspiracy, a claim not properly pled by Verigy in this action.

**VERIGY'S RESPONSE TO THE OBJECTION:**

The objection should be overruled. See Response to Objection # 30 above.

**W.MAYDER'S OBJECTION NO. 43:**

Opp. Rule 11 at p. 11, ln. 18-p. 13, ln. 16 re Romi Mayder's inventor's notebook and Wes Mayder's alleged involvement with such notebook.

(iv) ***"Wes Mayder Was Involved in the Willful Backdating of Romi Mayder's Inventor's Notebook."***

*Wes Mayder also actively conspired with his brother Romi Mayder in the backdating of Romi Mayder's inventor's notebook – a false and fraudulent activity in direct furtherance of their conspiracy to steal Verigy's intellectual property.*

*Wes Mayder admitted at his deposition receiving an email from his brother Romi Mayder on January 17, 2007 asking Wes Mayder to supply someone to witness entries in Romi Mayder's inventor's notebook and stated:*

*[REDACTED] (Gagliardi Decl., ¶ 2 and A (Wes Mayder Depo.Tr. at 89:1 – 91:3; 101:8 – 102:20 and Ex. 7) (emphasis added).) Wes Mayder replied by email the same day, offering up his employee, Jon Davidson, without questioning the legality or ethics of the task assigned. (Id.)*

*[REDACTED] Mayder never took issue with Romi Mayder's explicit request for assistance in falsifying records; instead, he dutifully complied. (Id.)*

*And, in fact, Romi Mayder's inventor's notebook was falsified by Davidson, whose declaration and deposition testimony are at odds with each other and at odds with the contemporaneous emails regarding the subject. The January 17, 2007 email string makes clear that [REDACTED]*

*[REDACTED] (See, Gagliardi Decl., ¶ 2 and A (Wes Mayder Depo.Tr. at 110:6-18 (conceding this truism).) Yet, Davidson swears under penalty of perjury in his declaration that the request for him to do so was made a month earlier:*

*In mid-December 2006, Romi [Mayder] sent an email to Wesley [Mayder] asking about obtaining verification of dates applicable to his lab notebook. Since I had spoken several times with Romi [Mayder] about his work at STS LLC, Wesley knew that I would be a good person for Romi to be referred to. I reviewed Romi's notebook, and based on my recollection of our discussions, I tried to sign with dates corresponding to approximately when we discussed the information. Wesley never directed me to do anything false or anything wrongful, nor would I do so.*

*(Davidson Decl., ¶ 7) (emphasis added). Thus, Davidson admits to backdating Romi Mayder's inventor's notebook but vainly denies that it amounts to anything "false" or "wrongful."*

*However, in contradiction of Davidson's own declaration, Davidson swears under oath in his deposition testimony [REDACTED]*

*[REDACTED] (Gagliardi Decl., ¶ 3 and Ex. B (Davidson Depo.Tr. at 34:24 – 35:14; 44:10 – 45:19).) In other words, Davidson [REDACTED]*

*[REDACTED]*  
*[REDACTED]*  
*[REDACTED] (Id., at 85:1 – 90:17 and Ex. 6) (copy of the notebook).) Davidson's*

1 deposition testimony and declaration simply cannot be harmonized – one or both must be untrue  
 2 on the subject of backdating the notebook, and indeed both are. Neither Davidson’s declaration  
 3 nor his deposition testimony is consistent with the definitive, contemporaneous documentary  
 4 evidence that the original request for Davidson to witness and endorse the notebook was not made  
 5 until January 17, 2007 and therefore Davidson simply could not have done so beforehand.<sup>13</sup>

Thus, Davidson (whose only connection to Romi Mayder is that he is Wes Mayder’s employee  
 4 offered up by Wes Mayder for the job of falsifying records) is utterly discredited as a witness.

Although it is unknown just when Davidson signed Romi Mayder’s notebook, what is  
 5 known is that it had to be after January 17, 2007 (rendering Davidson’s declaration and  
 6 deposition testimony utterly impossible), that it involved falsifying records, and that Wes Mayder  
 7 was inextricably involved in this scheme.

The evidence is thus overwhelming that Wes Mayder is thoroughly entangled with Romi  
 8 Mayder’s misdeeds involving the theft of Verigy’s technology. Plainly, Wes Mayder was an  
 9 integral part of the conspiracy with his brother Romi Mayder to tamper with evidence of the real  
 10 ownership of STS, Inc’s purported intellectual property. Wes Mayder’s assertion that he would  
 11 never do anything false or fraudulent is completely incredible in light of this evidence. Certainly,  
 12 at the very least, there is a colorable claim against Wes Mayder, precluding Rule 11 sanctions.

#### 11 **Grounds for Objection:**

12 Irrelevant and immaterial; Wes Mayder’s allowing on of his employees, Jon Davidson, to  
 13 assist Romi Mayder proves nothing regarding any of Verigy’s claims in this action, or of civil  
 14 conspiracy, a claim not properly pled by Verigy in this action.

#### 15 **VERIGY’S RESPONSE TO THE OBJECTION:**

16 The objection should be overruled. See Response to Objection # 31 above.

#### 17 **W.MAYDER’S OBJECTION NO. 44:**

18 Opp. Rule 11 at p. 13, lns. 11-14 re evidence of Wes Mayder’s having been an “integral  
 19 part” in a conspiracy with Romi Mayder to tamper with evidence

20 “The evidence is thus overwhelming that Wes Mayder is thoroughly entangled with Romi  
 21 Mayder’s misdeeds involving the theft of Verigy’s technology. Plainly, Wes Mayder was an  
 22 integral part of the conspiracy with his brother Romi Mayder to tamper with evidence of the real  
 23 ownership of STS, Inc’s purported intellectual property. Wes Mayder’s assertion that he would”

#### 23 **Grounds for Objection:**

24 \_\_\_\_\_  
 25 13

